Supreme Court, U.S.
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NO._____

IN THE

# Supreme Court of the United States

OCTOBER TERM , 1998

DANIEL SCOTT COX, PETITIONER

v.

LABOR (INDUSTRIAL) COMMISSION ET. AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

LABOR COMMISSION OF UTAH

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The denial of Jurisdiction for Judicial Review by the Court of Appeals where review is provided for by statute, and denial of certiorari by the Utah Supreme Court creates dual Federal issues where the "Highest Court of the State" is: (1) the Labor Commission regarding the violation of Petitioner's Constitutional right to Summary Judgement and Sanctions, and (2) the Utah Supreme Court regarding the violation of Petitioner's Constitutional right to Judicial Review.

1. Did the denial without finding of fact of Petitioner's Uncontested Motions for Summary Judgement and Sanctions and/or the refusal to rule on Uncontested Motions by the Commission violate Petitioner's rights under Amendment XIV, Section 1 of the U.S. Constitution?

2. Is Petitioner as a "Matter of Law" entitled to award of the Uncontested Motions for Summary Judgement and Sanctions etc.?

3. Did the denial of Judicial Review violate Petitioner's rights under Amendment XIV, Section 1 of the U.S. Constitution?

4. Did the "Arbitrary" Actions/Orders of the Commission and/or the denial of Judicial Review render the Utah's Worker's Compensation Act (UCA 35-1) Unconstitutional?

5. Is statute UCA 35-1-88 of the Worker's Compensation Act of Utah Unconstitutional?

6. Are injured workers entitled to Judicial Review of "Issues of Law" arising before a Final Order on the merits of a Worker's Comp. Claim is Issued?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgement below.

OPINIONS BELOW

[X] For cases from State Courts:

The opinion of the highest state court (Utah Labor Commission) to review the merits appears at Appendix A to the petition and is

[X] is unpublished

The opinion of the Utah Court of Appeals appears at Appendix B to the Petition and is

[X] is unpublished

The denial of my Petition for ReHearing by the Utah Court of Appeals appears at Appendix B to the Petition and is

[X] is unpublished

The opinion of the Utah Supreme Court appears at Appendix C to the petition and is

[X] is unpublished

## JURISDICTION

[X] For cases from State Courts:

> The date on which the highest state court decided my case was 30 October 1998. A copy of the decision is at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. $1257(a), where pursuant to Grovey v. Townsend, 79 L.Ed 1292, the Utah Labor Commission is the "Highest Court of the State in which a decision could be had" on Petitioner's Uncontested Motions where the right to subsequent Judicial Review was denied and where statutes UCA 35-1 and UCA 35-1-88 are drawn into Constitutional question.

The jurisdiction of this Court is invoked under 28 U.S.C. $1257(a) pursuant to Gillespie v. United States, 13 L.Ed 2d 199, 203; United States v. Richmond, 279 F2d 170, 172, where the Court of Appeals denied Jurisdiction for Judicial Review even though Jurisdiction is given by Utah Law, and the Utah Supreme Court denied a Petition for a Writ of Certiorari.

Jurisdiction is also proper: (1) under the THIRD CRITERIA of Cox Broadcasting v. Cohn, 43 L.Ed 2d 328, 338 - 341; (2) where Federal questions have been finally decided and there will be no piecemeal review (Flynt v. Ohio, 68 L.Ed 2d 489, 492; Gillespie v. United States Steel Corp., 13 L.Ed 2d 199, 204); (3) the questions presented are fundamental to the further conduct of the case (Gillespie v. United States Steel Corp., 13 L.Ed

2d 199, 204; and (4) there is danger that Petitioner will be denied justice by delay (Gillespie v. United States Steel Corp., 13 L.Ed 2d 199, 204).

## CONSTITUTIONAL, STATUTORY & REGULATORY

## PROVISIONS INVOLVED

The Constitutional provisions, statutes, rules and regulations involved being extensive, they are simply listed and their text is presented in detail in Appendix D here-in.

Constitutional Provisions:

Article I, Section 11, Utah Const.
Article I, Section 24, Utah Const.
Article VIII, Section 3, Utah Const.
Amendment XIV, Section 1, U.S. const.

Worker's Compensation Statutes:

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UCA 35-1-82.55
UCA 35-1-86
UCA 35-1-88

Administrative Procedures Act Statutes:

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UCA 63-46b-14
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Court Jurisdictional Statutes:

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UCA 78-2a-3(4)

Utah Rules of Civil Procedure:

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Worker's Compensation Rules:

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Utah Rules of Appellate Procedure:

Rule 5 Utah R.App.P.
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Rule 18 Utah R.App.P.
Rule 46a Utah R. App.P.

## STATEMENT

### STATEMENT - SUMMARY

Petitioner was diagnosed as having an Industrial Injury on 3/11/96, and filed for Worker's Compensation. Respondents denied compensability asserting, a pre-existing anxiety condition. Petitioner warned that their basis for denial was "Without Merit". Petitioner obtained Uncontested Motions for Summary Judgement and Sanctions which the Commission refused to act upon or denied without finding of fact. Petitioner filed a "Motion for Review" pursuant to UCA 63-46b-12 but the Commission failed to issue a "written Order on Review" as mandated by statute. Petitioner gave notice of the exhaustion of his remedies as allowed per UCA 63-46b-14(2)(b)(i) & (3)(a) and petitioned the Court of Appeals which denied jurisdiction for Judicial Review. His Petition for ReHearing was denied. Petitioner petitioned the Utah Supreme Court for a Writ of Certiorari on the issue of jurisdiction which was denied without comment.

### STATEMENT - ESSENTIAL STATUTES

Critical is an understanding of the Utah Worker's Compensation, Administrative and Jurisdictional Statutes which allow an "Interim Order" by an Administrative Law Judge to proceed to Judicial Review by the Utah Court of Appeals as a "Final Agency Order".

Prior to 1987, the Court of Appeals operated under the "Final Order - Only" rule where the only jurisdiction conveyed to the Court of Appeals for review of agency actions was:

> "78-2a-3 Court of Appeals Jurisdiction ...(2)(a) the final orders and decrees of state and local agencies ..."

In 1987, the Legislature enacted the Administrative Procedures Act, and amended the Jurisdictional Statutes for both the Court of Appeals and Supreme Courts to include the jurisdiction conveyed through the Admin. Procedures Act:

> "78-2a-3. Court of Appeals Jurisdiction ...(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings."

> "78-2-2. Supreme Court Jurisdiction ...(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency administrative proceedings."

The appeal process mandated by the Administrative Procedures Act is:

* Worker's Compensation statutes and rules (UCA 35-1-82.53 & R568-1-4(M) 2nd Sentence) allow for review of ANY ORDER by an Administrative Law Judge by filing a Motion for Review pursuant to UCA 63-46b-12. Thus "Interim Orders" which occur prior to "Formal Adjudicative Proceedings/Hearings" are subject to Administrative review.

* Then, pursuant to UCA 63-46b-12(6)(a) the Commission was mandated (shall being mandatory) to "Issue a Written Order On Review", which per UCA 35-1-82.53(2) is declared to be a Final Agency Order "unless set aside by

the Court of Appeals".

And UCA 35-1-86 specifically conveys jurisdiction to the Court of Appeals:

> "The Court of Appeals has jurisdiction to review, reverse or annul ANY ORDER of the commission ..." UCA 35-1-86

* In this manner, the Legislature created a process where an "Interim Order" concerning issues of law occurring at any point in the adjudicative process can be transformed by administrative review into a "Final Order", thus preserving the "Final Order - Only" rule in a manner which also protected individual's due process rights. (Rule 5 Utah R.App.P. for Appeal of Interlocutory Orders is not available in Administrative Actions per Rule 18 Utah R.App.P.)

* Then pursuant to R568-1-4(M) 1st Sentence, and R568-1-4(O) 2nd Sentence, judicial review pursuant to UCA 63-46b-14 could be obtained from the Court of Appeals by Petition for Review.

* And the Legislature sought to assure that the Court of Appeals would recognize and grant Judicial Review for "Issues of Law" raised at any time during adjudication through UCA 78-2a-3(4) and the Utah Supreme Court through UCA 78-2-2(6) would enforce such jurisdiction.

* And pursuant to UCA 63-46b-14(2)(b)(i) and UCA 63-46b-14(3)(a), the Legislature provided two special conditions under which exhaustion of administrative remedies was not required: (1) where administrative remedies were

"Inadequate", and (2) where it was proper to "Consider" the Commission's "Order on Review" to have issued where the Commission failed to so issue.

* And under UCA 63-46b-1(4) the Legislature specifically provided for the award of Summary Judgement if the criteria of Rule 56 of the Utah Rules of Civil Procedure were satisfied.

## STATEMENT - PROCEEDINGS IN THE COURTS BELOW

Note: All documents/records cited are included in the record before the Commission and/or Courts below. Statements made here-in are to be construed as statements of fact or belief which Petitioner swears to be true to the best of his knowledge.

1. On 3/11/96, Petitioner was diagnosed as having suffered an "Employment Related" "Inhalation Injury" while welding for his employer. On 10/2/96, he was denied Worker's Compensation Benefits on grounds of an alleged pre-existing anxiety condition which was subsequently not sustained by the medical records, diagnoses, or opinions of one psychologist and nine doctors as filed with the commission. Dr. Avery in a letter dated 3/10/97 refuted Respondents interpretation of his medical records, and Petitioner's family physician since 1984, when Petitioner was 9 years old, Dr. Hyldahl, in a letter dated 3/14/97 submitted to the Commission stated:

> "... I reviewed the medical records that I had on Daniel dating back to 1984. It is apparent on reading these records and reviewing the content that there

is nothing in these records to support a notion of a preexisting anxiety disorder or disorder of syncope. His record shows no indication of panic attacks, anxiety, depression and no indication of neurologic or cardiovascular disease."

2. Petitioner moved for and obtained six Uncontested Motions for Sanctions for Respondents subsequent misconduct including: false statements, false representations, omissions, improper application of statutes, and obstruction of Discovery including refusal to produce Interrogatories.

3. To escape the abuse of process to which he was being subjected by Respondents misconduct, Petitioner on 3/18/97 moved for and later obtained an Uncontested Motion for Summary Judgement. This Motion met the Rule 56 Utah R.Civ.P. criteria for award: (1) uncontested averments of 14 November 1996 claim, (2) uncontested Interrogatories to Respondents of 3 January 1997, (3) two uncontested sworn affidavits of 18 March 1997, (4) uncontested video of "Unsafe" work stations authorized by the Court, (5) facts and arguments of Petitioner's 18 March 1997 Motion for Summary Judgement, (6) rebuttal of Respondents basis for denial in Petitioner's 18 March 1997 Motion in Opposition to Respondents Motion for Dismissal to which Respondents failed to reply, (7) approximately 40 uncontested corroborating exhibits, and (8) the medical opinion of Respondents own medical specialists (Toxicologists) which refuted Respondents grounds for denial stating in relevant part:

"Your medical condition, currently diagnosed as anxiety/panic disorder was diagnosed subsequent to the inhalation exposure in question which occurred on

March 11, 1996. The symptoms from that exposure and in the ensuing weeks and months, as described in your medical records, are consistent with that diagnosis. There is no evidence in your medical records that this was a pre-existing condition, nor is there evidence from your work performance evaluation and attendance prior to this incident that you had any of these symptoms prior to March 11, 1996..." [Letter from Dr. Hardy and Dr. Lewis-Younger dated 4/9/97]

Respondents filed no sworn affidavits or other papers as required by Rule 56 Utah R.Civ.P. to establish any issues of fact requiring further adjudication. (See Jensen v. IHC Hospitals Inc., 944 P2d 327, 339).

4. Respondents also concealed "Material" evidence of unsafe welding conditions as discovered from Utah Occupational Safety and Health (UOSH) records on 7/31/97. Respondents withheld these "Material" records from the Petitioner for 15 months thus impeding Petitioner's medical diagnosis and treatment. They also withheld these records from their own Medical Specialist, Pulmonologist Dr. Able in order to obtain a favorable medical opinion under fraudulent pretenses, which opinion they cited in their 3/7/97 Motion to the Commission seeking dismissal of Petitioner's claim. In October 1997, Petitioner obtained additional Uncontested Motions for Sanctions for these acts of concealment and related misconduct.

5. On 14 July 1997, the ALJ entered an "Order" denying without finding of fact, Petitioner's Uncontested Mo-

tions for Summary Judgement and Sanctions [Exh. A, Pg 2a], and on 22 July 1997, the ALJ refused Petitioner's request to make finding of facts [Exh. B, Pg 4a].

6. On 7/31/97, pursuant to UCA 35-1-82.53 and R568-1-4(M) 2nd Sentence, Petitioner properly and timely filed a Motion for Review on "Issues of Law" under UCA 63-46b-12 with the Commission in order to obtain a "Final Agency Order". There-in, Petitioner cited five issues of law as grounds for appeal. [Petitioner did not assert constitutional violations at that time because such would have been improper where statutes provided for subsequent judicial review (Berry by and Through Berry, v. Beech Aircraft, 717 P2d 670, 680)].

The Commission thereafter refused, failed or neglected to release their "Order on Review" as mandated by UCA 63-46b-12(6)(a), and refused, failed or neglected to require Respondents to produce Interrogatories to Petitioner as "Ordered" by the Administrative Law Judge on 3/11/97 [Direction being an "Order" per UCA 35-1-44(7)] and on 7/14/97 [Exh. A&B]. Instead, the Commission issued an "Order" dated 10/27/97 that Petitioner was to attend a "Formal Adjudicative Proceeding/Hearing"

7. On 11/8/97, Petitioner, by letter, gave notice to the Commission of the inadequacies of his administrative remedies, citing the absence of Interrogatories and the absence of a response to his Appeal of 7/31/97. And he established the date of 11/17/97 as the date he would consider his administrative remedies exhausted and could then file for review with the Appellate Court [as allowed per UCA 63-46b-14(2)(b)(i)].

8. On 12/8/97, Petitioner filed his Petition for Review with the Court of Appeals, which date was 20 legal days after 11/17/97, thus satisfying the time constraints of UCA 63-46b-14(3)(a) and Rule 14 Utah R.App.P. Petitioner later amended his Petition via a revised Docketing Statement to include the additional Uncontested Motions obtained in October 1997.

> THESE ARE THE 15 UNCONTESTED MOTIONS NOW SUBMITTED TO THIS COURT FOR AWARD AS A MATTER OF LAW. [See Exh. F, Pg 59a].

9. Petitioner also made separate motions for protective orders on 12/22/97 and for sanctions against Respondents on 2/2/98 for false representations to the Court of Appeals.

10. On 4 June 1998, the Court of Appeals denied the Petition for Review of grounds of a lack of subject matter jurisdiction [Exh. C, Pg 6a].

11. On 10 July 1998, Petitioner filed a Petition for ReHearing on grounds of: (a) Err where the Court of Appeals had relied upon the wrong statute, (b) Err and Abuse of Discretion where the exhaustion of remedies was NOT REQUIRED, (c) Err where the proper date for filing limitations was 17 November 1997, (d) Err where the 15 day time limit in Varian-Eimac, 767 P2d 569 had been repealed, and (e) Err for failure to rule on Petitioner's separate motions.

There-in on pgs 2, 8, 9, 11, 14 & 15, Petitioner raised the issue of Constitutional due process violations of Amendment XIV, Section 1 of the U.S. Constitution.

12. On 2 July 1998, the Court of Appeals denied the Petition for ReHearing without comment [Exh. D, Pg 9a].

13. On 30 July 1998, Petitioner filed a Petition for Writ of Certiorari with the Utah Supreme Court citing: (a) Err for failure to reconcile UCA 78-2a-3(2)(a) with the Worker's Compensation, Administrative and Jurisdictional Statutes which provided for review of ANY ORDER, (b) Violation of the Court of Appeals mandated duty under UCA 78-2a-3(4) to accept jurisdiction, (c) Err because exhaustion of remedies was not required, (d) Disruption of the legislatively mandated process by the Commission's failure to issue an "Order on Review" pursuant to UCA 63-46b-12(6)(a), (e) Err for reliance upon 14 July 1997 instead of 17 November 1997 for filing limitations, and (f) Err for failing to disposition all issues. Petitioner argued there-in that he satisfied all criteria for Certiorari under Rule 46a Utah R.App.P., the criteria for Err, and the criteria for failure to perform duty under Rule 65(B)(d)(2)(B) Utah R.Civ.P. Included there-in were arguments that the Court of Appeals decision violated Petitioner's rights under Article I, Section's 11& 24 of the Utah Constitution (which by precedent encompass Amendment XIV violations of the U.S. Constitutional, See Whitmer v. City of Lindon, 943 P2d 226, 228), and there-in, Petitioner stated:

> "Thus the Court of Appeals rewrites the law such that it abridges Petitioner's rights under State Law and the State Constitution. Thus Petitioner is denied the protection of Article XIV, Section 1 of the U.S. Constitution. This circumstance therefore un-

dermines the premise and foundation of the Worker's Compensation Act because the legal protection which existed before the Act was instituted and which were included in the Act have been abridged. Therefore, unless the Court of Appeals decision is overturned, the denial of jurisdiction renders the Worker's Compensation Act Unconstitutional as applied under Amendment XIV, Section 1 of the U.S. Constitution." [Pgs 19 & 20 of Petition for Writ of Certiorari to the Utah Supreme Court]

14. In their response, Respondents omitted to inform the Supreme Court that the Commission by Order of 28 February 1998 had cancelled the Hearing, and falsely informed the Court that Petitioner had "Failed to attend the Hearing" or words to that effect, multiple times in their Response. Petitioner objected, seeking sanction of "Default" for Attorney/Client misconduct. Petitioner requested leave of the Court to file a sworn affidavit concerning the 32 actions of misconduct to the Supreme Court (See Extract of Table Exh. G, Pg 65a).

15. On 30 October 1997, without allowing Petitioner to file his sworn affidavit, the Utah Supreme Court denied the Petition for Writ of Certiorari without comment [Exh. E, Pg 11a].

## REASONS FOR GRANTING THE PETITION

GENERAL:

I. Judicial Review Required:

Where Petitioner was denied the right of Judicial Review of issues of law affecting Constitutional rights, Petitioner's due process rights under Amendment XIV, Section 1 of the U.S. Constitution are violated (St. Joseph v. United States, 80 L.Ed 1033, 1041, 1054, 1058; State v. Finch, 315 P2d 529, 532, 533, Citing 5 other cases; Warren v. Indiana, 26 N.E. 2d 399, 401, 404, 409) and the Worker's Compensation Act (UCA 35-1) is made unconstitutional.

> "The Constitutionality of the Workmen's Compensation Act depends upon the right of judicial review to determine whether the findings are supported by evidence." Merton v. Ind. Comm., 50 N.W.2d 42, 46; See also Johnson v. Ind. Comm., 87 N.W.2d 822, 826; Borgnis v. Falk, 133 N.W. 209, 219

II. Labor Commission Is "Highest Court Of The State" Regarding The Commission's Actions and Orders And Petition Is Timely:

When the Utah Supreme Court denied the Petition for Writ of Certiorari, a "Final Judgement or Decree" was rendered denying the availability of Judicial Review on Federal issues arising during administrative proceedings (United States v. Richmond, 279 F2d 170, 172), which exhausted Petitioner's State remedies. Further, the right of Judicial Review "afforded" by statute and rule is therefore "not available", and Petitioner is denied a substantial right (United States v. Dowd, 180 F2d 212, 215). Thus, the Labor Commission was defaulted to become the "Highest Court of the State" in which a decision on Petitioner's Constitutional rights could be had. And the Petition is proper under the precedent of Grovey v. Townsend, 79 L.Ed 1292 where a

"Federal question that can't be appealed under state law, can jump from the lowest court in the State to the highest court in the land." (28 U.S.C.A. $1257(a), Commentary, pg 97, 98) where the U.S. Supreme Court is Petitioner's "appropriate and only remaining remedy", and UCA 35-1 & UCA 35-1-88 are questioned.

Petitioner was obligated to comply with Utah's statutory appeal process, and could not anticipate that the Utah Courts would deny judicial review. Thus, 30 October 1998, when the Utah Supreme Court denied the Petition for a Writ of Certiorari, the last event necessary to create a Constitutional issue occurred.

> "[Constitutionality] is satisfied if the Law provides an injured person an effective and reasonable alternative remedy "by due process of law" for the vindication of his Constitutional Interest." Berry by and through Berry v. Beech Aircraft, 717 P2d 670, 680 (Ut. Sup. Ct. 1997)

Thus, the statute of limitations for filing with the U.S. Supreme Court could not begin to run until after 30 October 1998 when the last action occurred (See Berry by and through Berry v. Beech Aircraft, 717 P2d 670, 672; Wilson v. Iseminger, 46 L.Ed 804, 807; Aragon v. Clover Club Foods Co., 857 P2d 250, 252, 253; Becton Dickinson & Co. v. Reese, 668 P2d 1254, 1257, Meyers v. McDonald, 635 P2d 84, 86, 88) and can not run from earlier dates such as 14 July 1997 where this court held that Federal Jurisdiction cannot be defeated by State imposed statute of limitations where here was no failure to prosecute (Order of R. Telegrapher v. Railway Exp. Agency, 88 L.Ed 789, 792, 793).

Thus the Petition regarding the Commission's violation of Petitioner's 14th Amendment Constitutional rights by the Utah Labor Commission is proper and timely.

III. Utah Supreme Court is "Highest Court Of The State" Regarding The Issue Of Judicial Review, and Petition is Timely.

When the Utah Supreme Court denied the Petition for a Writ of Certiorari on 30 October 1998, their action also constituted a "Final Judgement or Decree" with regard to the denial of jurisdiction by the Court of Appeals for Judicial Review. As such, their denial is from the "Highest Court Of The State where a decision could be had" on the issue of Petitioner's Constitutional due process rights to Judicial Review (United States v. Richmond, 229 F2d 170, 172).

The Petition is therefore proper and timely regarding the violation of Petitioner's Constitutional due process rights under Amendment XIV, Section 1 of the U.S. Constitution, and the Constitutionality of the Worker's Compensation Act (UCA 35-1).

IV. Exceptions To U.S. Supreme Court Final Judgement Rule Are Satisfied:

The Utah "Decision" adopts the strange logic that Petitioner's appeal regarding the denial without finding of fact of an Uncontested Motion for Summary Judgement cannot be heard because it is not against a "Final Order from a Formal Adjudicative Proceeding/Hearing". Thus the "Decision" makes precedent the need to complete the Adminis-

trative Process which Summary Judgement was designed and intended to avoid when no issues of fact remain to be adjudicated.

> "To say that a false denial, which defendants are unable to justify, must nevertheless put the Plaintiff to his common-law proof before a jury, although the result would be a directed verdict in Plaintiff's favor as a matter of law, is to exalt the shadow above the substance." Engl v. Aetna Life Ins. Co., 139 F2d 469, 473

If Petitioner acquiesced to a Hearing and won, the Federal Issue would be mooted, and if he lost, the Federal Issue (violation of due process rights by denial of Uncontested motion for Summary Judgement without finding of fact) could not then be heard because subsequent appeal would of necessity be from the "Final Order from the Formal Adjudicative Proceeding/Hearing".

On this point, the jurisdiction of the U.S. Supreme Court is clear under the THIRD CRITERIA as stated in Cox Broadcasting Corp. v. Cohn, 43 L.Ed 2d 328, 338 - 341.

A parallel argument is also made for the Commission's failure to rule or denial without finding of fact on the other 14 Uncontested Motions now before this Court. [Exh. F, Pg 59a]

This petition also qualifies because there is no possibility of piecemeal review of Federal Issues (Flint v. Ohio, 689 L.Ed 2d 489, 492) because the fundamental Worker's

Compensation claim has no federal issues, and all Federal issues raised by the improper actions of Respondents the Commission or Utah Courts are included (Gillespie v. United States Steel Corp., 13 L.Ed 199, 203, 204. Further, the issue of the Constitutional Reasonableness of severe sanctions as a deterrent to egregious misconduct is fairly included and has been briefed on 2 June 1998 to the Court of Appeals, wherein Petitioner relied upon this Court's precedent of TXO Productions v. Alliance Resources, 125 L.Ed 2d 366, 370 for Pattern of Misconduct, and other cases of misconduct (Wilson v. IMP Inc., 558 N.W.2d 132, 134, 143, 144 for Interference with Medical Treatment; VanDYKE v. Mt. States Coin Machine Dist., 758 P2d 962, 966 for Abuse of Process with Advice of Attorney; and Amica Mut. Ins. Co. V. Schettler, 768 P2d 950, 955, 962 for Coercion, Intimidation, Threats and Interference with Judicial Process by Client and Attorney).

Thus exceptions to this Court's Final Order Rule are satisfied and this petition is proper.

Issues Arising From Commission's Actions or Orders:

V. Commission's Actions and Orders Are Unconstitutional Where Arbitrary, Unfair, Unreasonable, Or Oppressive:

The U.S. Ninth Circuit Court of Appeals has held that:

> "Workmen's Compensation Acts, to be Constitutional, must not be arbitrary, unreasonable, or fundamentally unfair or oppressive." (Marshall v.

Mahony, 56 F2d 74, 78; as followed by the D.C. & Seventh Circuit Courts in Johnson v. Britton, 290 F2d 355, 359 and Strand v. Hansen, 614 F2d 572, 576).

Review of Utah case law clearly shows that the Commission's denial of Uncontested Motions for Summary Judgement and Sanctions without finding of fact and/or the failure to rule on other Uncontested Motions or enforce their own orders all violate these criteria for Constitutionality.

* ARBITRARY: Where Uncontested Motions are denied without finding of fact or where the Commission fails to believe and act (Baker v. Ind. Comm., 405 P2d 613, 615; Jones v. California Packing, 244 P2d 640, 641; Spencer v. Ind. Comm., 40 P2d 188, 189)

* IMPROPER: Where the Commission failed to take motions as they were presented (Milkovich v. Ind. Comm., 64 P2d 1290, 1292)

* REVERSIBLE ERR: Where Uncontested Motions were denied without finding of fact (Nyrehn v. Ind. Comm., 800 P2d 330, 335)

* UNFAIR: Where Commission failed to enforce its own orders for Respondents to produce Interrogatories to Petitioner (Bunnell v. Ind. Comm., 740 P2d 1331, 1333)

* CONTRARY TO THE WHOLE RECORD BEFORE THE COMMISSION: Where the whole record supports award to Petitioner (Grace Drilling v. Ind. Comm., 776 P2d 63. 67 & 70)

* CONTRARY TO STATUTES GOVERNING COMPENSABILITY CRITERIA: Where Petitioner's 14 November 1996 claim, and 18 March 1997 Uncontested Motion for Summary Judgement demonstrated compliance with award criteria of Allen v. Ind. Comm., 729 P2d 15, 16, 18, 19, 25-26)

* UNJUST AND OPPRESSIVE: Where the Commission tried to force Petitioner to a Hearing absent his due process rights to Interrogatories and other Discovery, and refused, failed or neglected to provide an "Order on Review" regarding his appeal as mandated by statute (Amica Mut. Ins. Co. v. Schettler, 768 P2d 950, 962; Bunnell v. Ind. Comm., 740 P2d 1331, 1333)

* UNJUST, OPPRESSIVE AND CONTRARY TO THE SPIRIT OF THE ACT: Where Petitioner was subjected to hardship; forced to carry the burden of his injury; forced to prove his employer's negligence; forced to endure an abuse of process which is not simple, adequate or speedy; and where doubt is not resolved in the favor of the injured worker (Baker v. Ind. Comm., 405 P2d 613; Barber v.Ind. Comm., 135 P2d 266; Fred Meyer v. Ind. Comm., 800 P2d 825 Citing 3 others; Park Utah Consol. Mines Co., Wilstead v. Ind. Comm., 407 P2d 69236 P2d 979 Citing 8 others: Taslich v. Ind. Comm., 262 P2d 281, 283;

* CONTRARY TO AWARD CRITERIA FOR SUMMARY JUDGEMENTS: Where criteria for Summary Judgement were met as presented at Indenture 3.0, Pg 5 & 6 herein (Dupler v. Yeates, 351 P2d 624, 636, 637; Engl v. Aetna Life Ins. Co., 139 F2d 469, 472, 473; James v. Honaker Drilling Inc., 254 F2d 702, 706; Amica Mut. Ins. Co., v. Schettler,

768 P2d 950, 957; Jensen v. IHC Hospitals Inc., 944 P2d 327, 339);

* AN ABUSE OF DISCRETION: Where the Commission denied without finding of fact or failed to rule when all conditions precedent to award was satisfied, and statutory or rule language was permissive or mandatory (Deseret Sav. Bank v. Francis, 217 P 1114, 1115-1116; In Re. Owens' Estate, 85 P 277, 279; Pearce v. N.D. Workmen's Compensation Bureau, 274 N.W.2d 587, 590; Tice v. State Ind. Acc. Comm., 195 P2d 188, 192; Supervisors v. United States, 18 L.Ed 419, 423).

Thus, the Commission's conduct of the adjudicative proceedings under Utah precedents violates the constitutionality criteria of Marshall v. Mahony, 56 F2d 74, 78; Johnson v. Britton, 290 F2d 355, 359 and Strand v. Hansen, 614 F2d 572, 576.

The Petition is therefore proper to determine if Petitioner's 14th Amendment rights were violated, and if the Worker's Compensation Act (UCA 35-1) is rendered Unconstitutional.

VI. The Commission's Abuse Of Discretion Is Unconstitutional:

The U.S. Supreme Court has held that it is an abuse of discretion for a public official to deny a remedy stated in permissive language where the attached criteria are satisfied.

> "where power is given to public officers, in the language of the Act before us, ... whenever the public interest or individual rights call for its exercise - The lan-

guage used, though permissive, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done." Supervisors v. United States, 18 L.Ed 419, 423

In contrast is the statutory language governing the discretion of the Commission:

"The commission may make its investigation in such manner as in its judgement is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act." UCA 35-1-88

From the actions of the Commission, it is clear that they interpret discretion to accrue to their benefit rather than to Petitioner as per Supervisors v. U.S. Id.

Thus, even though the Uncontested Motions met the criteria of UCA 63-46b-1(4) and Rules 1, 11, 37, 54 & 56 of the Utah R.Civ.P., the Commission under UCA 35-1-88 may have believed they had the discretion to simply ignore the language of these Rules and either refuse to rule on these Uncontested motions or deny them without finding of fact. But such an interpretation is in direct conflict with this Court's precedent of Supervisor's v. United States, Id.

Where the discretionary practices of the Commission and the language of UCA 35-1-88 conflict with the precedent of Supervisor's v. United States, 18 L.Ed 419, 423, Petitioner's Constitutional rights under Amendment XIV, Section 1 of the U.S. Constitution are abridged and the Worker's Compensation Act (UCA 35-1) is rendered Unconstitutional.

Further, the language of UCA 35-1-88 is sufficiently broad that it's application according to the Commission's "Judgement" may abridge Constitutional rights of individuals, and is simultaneously sufficiently vague that no Pro Se individual can understand how a proceeding is to be conducted. Rule R568-1-4(N) provides that the Utah Rules of Civil Procedure be followed during Discovery "except as modified by the express provisions of 35-1-88". But UCA 35-1-88 contains no "express" language, and thus the application of discretion is left to the whim of the Commission or Administrative Law Judge, giving rise to infringements of due process rights and unequal treatment under the law.

Petition is therefore proper to address the constitutionality of UCA 35-1-88 as it governs the discretion of the Commission and the violation of Petitioner's 14th Amendment Constitutional rights where the Commission abuses their discretion per the precedent of Supervisor's v. United States, 18 L.Ed 419, 423.

VII. Petitioner Is Entitled To Award As A Matter Of Law:

Petitioner's 15 Uncontested Motions [Exh. F, Pg 59a] as presented to the Court of Appeals are here-in presented for Award by this Court as a "Matter of Law" because the denial without finding of fact or refusal to act violates Petitioner's 14th Amendment Constitutional Rights and Petitioner has no remedy within the State as evidenced by the Utah Court's denial of Judicial Review.

Had finding of fact been properly made on each of the 15 Motions Petitioner argues that each: (1) was properly made, (2) was properly substantiated, (3) Motions consti-

tuted adequate notice before being submitted for decision, (4) refuted respondents pleadings, (5) were supported by the whole record before the Commission, (6) met the criteria for award, (7) were supported by fact and argument therein, (8) were not contested, disputed or denied by Respondents, and (9) where Respondents failed to file any sworn affidavits raising any issue of fact requiring adjudication ( Dupler v. Yeates, 351 P2d 624, 636, 637; Engl v. Aetna Life Ins. Co., 139 F2d 469, 472, 473; James v. Honaker Drilling Inc., 254 F2d 702, 706; Amica Mut. Ins. Co., v. Schettler, 768 P2d 950, 957; Jensen v. IHC Hospitals Inc., 944 P2d 327, 339), the failure of the Commission to award is arbitrary, unjust, unfair, oppressive and an abuse of discretion under Supervisor's v. United States, 18 L.Ed 419, 423 et. al.

Thus where there is no right of Judicial Review "AVAILABLE" to Petitioner within the State of Utah, petition to the U.S. Supreme Court is proper to determine if Petitioner is entitled to each of these Uncontested Motions as a matter of law.

Issues Arising From Court of Appeals Denial Of Jurisdiction:

VIII. The Court of Appeals Decision Err's. And Abuses Discretion

VIIIA. Plain Err

Where the Utah Courts fail to recognize the plain language (Allred v. Utah State Retirement Board, 914 P2d 1172, 1175) and intent of the statutes and rules governing

appeals and subsequent Judicial review of ANY ORDER of an Administrative Law Judge as presented at Pgs 1 thru 4 here-in, the Utah Courts commits plain err, and this Petition is proper.

VIIIB. The Court of Appeal's Decision Err's by Failure to Harmonize Their Selected Statute UCA 78-2a-3(2)(a) With The Other Statutes Conferring Jurisdiction to the Court of Appeals for ANY ORDER of the Commission Including UCA 35-1-82.53, UCA 35-1-86, UCA 63-46b-14, UCA 78-2a-3(4), and UCA 78-2-2(6):

The Court's "DECISION" is contrary to their DUTY to harmonize under Utah precedent (Bennion v. Sundance Development Corp., 876 P2d 1233, 1235; Jerz v. Salt Lake County, 822 P2d 772, 773; De Baritault v. Salt Lake City Corp., 913 P2d 743, 747) and is contrary to established principles of construction observed by other jurisdictions as summarized in 99 C.J.S. Workmen's Compensation, $20, f. Construction of Acts, Pgs 125 - 128

Had the Utah Courts discharged their duty to harmonize, the Worker's compensation statutes would have prevailed because they are the more specific (Bateman v. Board of Examiners, 322 P2d 381; Jensen v. IHC Hospitals Inc., 944 P2d 327, 331, and Pan Energy v. Martin, 813 P2d 1142, 1145 Citing other precedents), and the Courts selected statute UCA 78-2a-3(2)(a) would have failed because its adoption nullifies the effect of the more specific statutes UCA 35-1-82.53, UCA 35-1-86, UCA 63-46b-14, UCA 78-2a-3(4), and UCA 78-2-2(6) (In Re Utah Savings and Loan Assoc., 442 P2d 929, 932, 932 N.1).

VIIIC. The "Decision" Err's by Restricting Review to "Final Orders Issuing From Formal Adjudicative Proceedings/Hearings" where Utah Statutes Specifically Provide for Judicial Review of ANY ORDER by the Court of Appeals.

The "DECISION" is contrary to Utah precedents (Blue Cross and Blue Shield v. State, 779 P2d 634, 638; Harmon v. Odgen City Civil Service Commission , 890 P2d 4, 6) and violates the separation of powers criteria cited in 99 C.J.S. Workmen's Compensation, Pgs 120 & 121 [Citations Omitted].

The decision rewrites the act to change the class from "Any Order" to only those "Final Orders from Formal Adjudicative Proceedings or Hearings". Thus they establish a class not contemplated by the clear language statutes UCA 35-1-82.53 and UCA 35-1-86 (Brendle v. City of Draper, 937 P2d 1044, 1047), which is contrary to Utah precedent and the holdings of other jurisdictions, and directly violates the equal protection provisions of Amendment XIV, Section 1 of the U.S. Constitution.

VIIID. The Court of Appeals Err'd and Abused their Discretion Holding That the Exceptions to Exhaustion of Administrative Remedies under UCA 63-46b-14 Did Not Apply:

By failing to issue their "Order on Review" as mandated by statute UCA 63-46b-12(6)(a): (a) the Commission lost their jurisdiction per Herr v. Salt Lake City, 525 P2d 728, 729, (b) Petitioner was allowed to "Consider" the "Order on Review" to have issued under the rule that the intent of the act

must be reviewed (De Baritault v. Salt Lake City Corp., 913 P2d 743, 746) where the intent as shown by UCA 63-46b-13 and UCA 63-46b-14(3)(a) was to allow "Consideration" in instances where the Commission did not issue such "Order on Review", and (c) the Court had a mandatory duty to waive exhaustion of remedies and accept jurisdiction per the permissive language of UCA 63-46b-14(2)(b)(i) where Petitioner had demonstrated the inadequacies of his administrative remedies in his letter of 8 November 1997 as attached to his Petition for Review (Supervisors v. United States, 18 L.Ed 419, 423; Deseret Sav. Bank v. Francis, 217 P 1114, 1115-1116; In Re. Owens' Estate, 85 P 277, 279; Pearce v. N.D. Workmen's Compensation Bureau, 274 N.W.2d 587, 590; Tice v. State Ind. Acc. Comm., 195 P2d 188, 192).

VIIIE. The Court of Appeals Err's When They Rely Upon 14 July 1997 Instead Of 17 November 1997 As The Date From Which The Petition Should Have Been Filed From.

Petitioner clearly followed Statute UCA 35-1-82.53 and Rule R568-1-4(M) 2nd Sentence in filing his Motion for Review with the Commission 17 days after the ALJ's "Order" of denial issued on 14 July 1997. Thus he complied with UCA 63-46b-12. Petitioner could not anticipate that the Commission would refuse to perform their statutory duty and fail to issue their "Order on Review" by the date of 17 November 1997.

The Court of Appeal's err's by reliance on 14 July 1997 rather than 17 November 1997 as the date for the running of limitations. Limitations cannot run until the last event has occurred (Aragon v. Clover Club Foods, 857 P2d 250, 252, 253; Berry by and through Berry v. Beech Aircraft, 717 P2d 670,

672; See also Wilson v. Iseminger, 46 L.Ed 804, 807; Becton Dickinson & Co. v. Reese, 668 P2d 1254, 1257). And per Meyers v. McDonald, 635 P2d 84 the decision violates the "Open Courts Provision" of Art. I, Sec. 11 of the Utah Constitution). And the U.S. Supreme Court has held in Order of R. Telegrapher's v. Railway Exp. Agency, 321 U.S. 349, 350; 88 L.Ed 789, 792, 793 that where claims are timely pursued that the statute for an earlier determination cannot "destroy a claim because the period of actual contest over it in a ... tribunal extends beyond the [latter] limitations period."

VIIIF. The Court of Appeals Reliance On Varian-Eimac Is Err

The Court of Appeals reliance on the 15 day time limit of Varian-Eimac, 767 P2d 569 is err because the 15 day time limit under UCA 35-1-82.55 was repealed in 1988 (Varian-Eimac, 767 P2d 570 n. 1) and is thus not applicable. Thus the precedent of Varian-Eimac is not applicable.

The proper time limits are the 30 day periods of UCA 63-46b-14(3) and Rule 14 Utah R.App.P., and where Petitioner's filing on 8 December 1997 was only 20 calendar days after 17 November 1997, his Petition met the applicable timelines for filing.

VIIIG. The Court of Appeals Err'd by Failing to Rule on Petitioner's Separate Motions for Protective Order and Sanctions Against Respondents.

Such is reversible err requiring remand (Brendle v. City of Draper, 937 P2d 1044, 1048, 1049).

VIIIH. Summarization of Err and Abuse of Discretion

Given the err and abuse of discretion of the Court of Appeals "Decision" as shown above, the Petition should be granted to reverse err's which infringe Petitioner's 14th Amendment Constitutional rights, and render the Utah Worker's Compensation Act (UCA 35-1) Unconstitutional.

IX. Violation of Duty by the Utah Courts

The denial of Judicial Review also results from the Utah Court's violation of duty under precedent, Statute and Constitutional Provisions.

* The Court of Appeals violated their self imposed duty under Bennion v. Sundance Development Corp., 876 P2d 1232, 1235 to harmonize statutes.

* The Court of appeals violated their Statutory duty under UCA 35-1-86 and UCA 78-2a-3(4) to accept Jurisdiction .

* The Supreme Court of Utah violated their self imposed duty under De Baritault v. Salt Lake City Corp., 913 P2d 743, 747 and Jerz v. Salt Lake County, 882 P2d 770, 773 to harmonize statutes.

* The Supreme Court of Utah violated their self imposed duty under Salt Lake City v. Ohms, 881 P2d 844, 847 (Citing 3 other precedents) to examine Petitioner's challenge to the Constitutionality of the Worker's Compensation Act (UCA 35-1) and the violation of his 14th Amendment Constitutional rights.

* The Supreme Court of Utah violated their Statutory duty under UCA 78-2-2(6) and their Constitutional duty under Article VIII, Section 3 when they denied Certiorari and failed to enforce the Jurisdiction for Judicial Review before the Court of Appeals.

* The Supreme Court of Utah abused their discretion where Petitioner satisfied Rule 46a criteria for Certiorari (Supervisor's v. United States, 18 L.Ed 419, 423).

These violations of duty and discretion deprived Petitioner of his due process right to Judicial Review in a Court of Law on Issues of Law arising during the course of Worker's Compensation proceedings.

Although this Court and other Federal and State Jurisdictions have held that a right of Judicial Review is necessary to protect individual constitutional rights (St. Joseph v. United States, 80 L.Ed 1033, 1041, 1054, 1058; State v. Finch, 315 P2d 529, 532, 533, Citing 5 other cases; Warren v. Indiana, 26 N.E. 399, 401, 404, 409) and other jurisdictions have held similarly with respect to Worker's Compensation Acts (Merton v. Ind. Comm., 50 N.W.2d 40, 46; See also Johnson v. Ind. Comm., 87 N.W.2d 822, 822; Borgnis v. Falk, 133 N.W. 209, 214), this Court should now take this case and determine if a right of Judicial Review must exist in Worker's Compensation Proceedings to protect rights from the misconduct of employer's or their insurer's or the improper conduct of proceedings prior to the issuance of a "Final Order" as per Question 6 posed to this Court,and to determine if Petitioner's 14th Amendment rights were violated by the Utah Court's failure to perform duties.

Closure

X. The Issues of This Case are Important Federal Issues of National Interest:.

Where the Utah "DECISION" clearly violates Utah precedents and conflicts with the decisions of other jurisdictions and this Court, the Petition should be granted.

Where this Court and other jurisdictions have held that there must be judicial review to protect individual constitutional rights, and where the "DECISION" denies such review, the Petition should be granted.

Where Federal Courts have held Worker's Compensation Acts to be Unconstitutional if arbitrary, unreasonable, or fundamentally unjust or oppressive, and where there is Prima Facie evidence that the Utah Commission's conduct under UCA 35-1 violates these criteria, the Petition should be granted.

Where the plain language of Utah statutes governing administrative and judicial reviews is in conflict with the "DECISION" of the Utah Courts, and where the Court's Err infringes Petitioner's 14th Amendment Constitutional rights, the Petition should be granted.

Where the Federal issues cannot later be raised if State Court action is allowed to be completed, the Petition should be granted.

Where the case raises the issue of protection of fundamental Constitutional rights during Worker's Compensation

proceedings, and where injured workers are least able by virtue of injury, loss of wages, education and inability to obtain legal representation to defend against egregious misconduct by more powerful employers and insurers, and where there is risk that continued state litigation will force Petitioner to withdraw because of financial pressures, this Petition should be granted (Gillespie v. United States Steel Corp., 13 L.Ed 199, 203, 204).

Petitioner recognizes that denial of this Petition by the U.S. Supreme Court would not normally constitute a judgement on the merits, but asserts that a denial would have adverse National consequences. This case is unusual. Under the Utah precedent Savage v. Educators, 908 P2d 862, the Utah Supreme Court held that an injured worker has no cause of action against a Worker's Comp. insurer for "Bad Faith Practices" because there is no privity of contract. Thus, unless severe sanctions are Constitutionally acceptable as a deterrent to egregious misconduct, injured workers who are least able to defend themselves, especially those who are Pro Se, are at the mercy of outrageous misconduct by insurance carriers which is contrary to the "Spirit of the Act" and violates their due process rights.

The denial of this Petition, although it would not be a judgement by this Court on the Merits, would never-theless encourage employers and insurers, and particularly the National Insurer involved in this case, that egregious and/or outrageous misconduct will be tolerated by the Courts, and can be used to unfairly avoid compensation payments as evidenced by their self serving letter of 21 February 1997 [Exh. H, Pg 71a]

Further, denial will perpetuate the Utah Court's refusal to hear appeals when Uncontested Motions for Summary Judgement and Sanctions are arbitrarily, unjustly and improperly denied and injured workers 14th Amendment Constitutional rights are infringed. Surely, the right to Summary Judgement must be jealously protected.

If this Court condones any or all of the forms of misconduct alleged to be fairly included in the case [Exh. G, Pg 65a], then this Court should grant the Petition and rule accordingly that all injured workers in all jurisdictions may receive equal treatment under such a standard of law.

But if this Court finds any or all of these forms of misconduct [Exhibit G, Pg 65a] or the "Decision" of the Utah Courts to be contrary to the "Rule of Law", subversive to Worker's Compensation Acts in general, contrary to individual rights or repugnant to the U.S. Constitution, then the Petition should be granted to establish for all jurisdictions the rights of injured workers throughout Worker's Compensation proceedings as per Question 6.

Thus Petitioner argues that the Petition for Writ of Certiorari to this Court should be granted so that both parties may have their day in Court, and the National issue of Question 6 may be answered..

## CONCLUSION

Petitioner thanks the Court for the opportunity to be heard, and respectfully prays that his Petition for a Writ of Certiorari be granted.

Respectfully Submitted This 23 Day of January 1999

Daniel S Cox

Daniel Scott Cox
Pro Se

APPENDIX A


| EXHIBIT | DESCRIPTION | PAGE NO. |
|---|---|---|
| A | 14 July 1997 "Order" denying Petitioner's Uncontested Motions without finding of fact | 2a |
| B | 22 July 1997 "Order" refusing to make finding of fact | 4a |

Labor Commission
State of Utah

FAX COVER SHEET
1 PAGES
DATE: JULY 14, 1997
FROM: JUDGE GEORGE
ADJUDICATION

DIVISION

FAX#; 530-6804 TEL# 530-6865

| TO | FAX# | TEL# |
|---|---|---|
| Cox, D | (By Mail) | |
| Dyer, M | 521-7965 | 521-7900 |

Re: Cox, D 961068

Mr. Cox - you may disregard the impending dismissal portion of my 4/21/97 fax as I understand you have provided the requested hair sample, and I have the further impression that you have or will co-operate in the respondents medical examinations.

Having said that, we will get to the merits of this case by proceeding toward a hearing. Accordingly, both your Motion for Summary Judgement and the Respondents Motion for Dismissal are denied. Your requests for sanctions are denied. Your request for a transcript is denied. Your options in that respect are to hire a court reporter or purchase a copy of the PHC tape from Ms. Mele or come and listen to a copy of the tapes here. The latter two are much less expensive than the former if you just want to refresh yourself on that proceeding. However, the former is better for purposes of appeal.

Mr. Dyer - pursuant to your 3/17/97 letter, please advise within 20 days, 1) when Mr. Cox's outstanding discovery will

be answered, if not already done; 2) what, if any respondents medical exams remain to be done, or when they are scheduled for. "s/DJG"

CERTIFICATE OF SERVICE

I certify that I have filed the foregoing FAX to the following by first class prepaid postage this 14th day of JULY, 1997:

DANIEL COX, 1199 CLIFFSIDE DR, LOGAN UT 84321

"s/JCarb..."

Labor Commission
State of Utah

FAX COVER SHEET
1 PAGES
DATE: JULY 22, 1997
FROM; JUDGE GEORGE
ADJUDICATION DIVISION
FAX#; 530-6804 TEL# 530-6865

| TO | FAX# | TEL# |
|---|---|---|
| Cox, D | (By Mail) | |
| Dyer, M | 521-7965 | 521-7900 |

Re: Cox, D 961068

Mr Cox - your 7/26(?)/97 request for justification and findings of fact on interim motions is denied.

I remind you that you have chosen to act as your own attorney. Accordingly, you are presumed to know the law and procedure, so your anticipations of "guidance" from me are misplaced.

Likewise as to forms and their utilization.

"s/DLG"

CERTIFICATE OF MAILING - I certify that I have mailed the foregoing FAX to the following by first class prepaid postage this 28th day of JULY, 1997:

Daniel Cox, 1199 Cliffside Dr., Logan, Utah 84321

APPENDIX B


| EXHIBIT | DESCRIPTION | PAGE NO. |
|---|---|---|
| C | 4 June 1998 "Memorandum Decision" by Utah Court of Appeals denying jurisdiction for Judicial Review | 6a |
| D | 2 July 1998 "Order" denying without comment Petitioner's Petition for ReHearing | 9a |

FILED
JUN 04 1998
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| Daniel Scott Cox<br>Petitioner | : | Memorandum Decision<br>Not for official<br>publication |
| v. | : | Case No. 970721-CA |
| Proform Fitness/Weslo;<br>Liberty Mutual Ins.<br>Company; and/or Utah<br>State Industrial<br>Commission<br>Respondents | : | Filed<br>(June 4, 1998) |

Original proceeding in this Court

Attorneys: Daniel Scott Cox, Logan, Petitioner, Pro Se
Michael E. Dyer, Salt Lake City, for Respondents Proform Fitness/Weslo and Liberty Mutual Insurance Company

Before Judges Billings, Greenwood and Jackson

PER CURIAM:

This case is before this court on a sua sponte motion for summary dismissal and on petitioner's motion for protective orders and motion for summary reversal. Respondents also request an award of sanctions against petitioner.

This court has subject matter jurisdiction over "final orders and decrees resulting from formal adjudicative proceedings of state agencies" including the Utah Labor Commission. Utah Code Ann. $ 78-2a-3(2)(a) (1996). Utah Code Ann $ 63-46b-14 (1997) governs "judicial review of final agency action." With limited exceptions not applicable in this case, "[a] party may seek judicial review only after exhausting all administrative remedies available." Id. $ 63-46b-14(2). A party must file a petition for judicial review of final agency action with the appellate court within 30 days after the date of that the order constituting the final agency action is issued. See Id. $ 63-46b-14(3); Utah R.App.P. 14(a).

Petitioner filed a request for judicial review of the July 14, 1997 of an administrative law judge denying Petitioner's motion for summary judgement and respondent's motion to dismiss. The ALJ ordered the case to proceed to an evidentiary hearing. Because no hearing has occurred in the agency, no agency decision constituting a final agency action has issued. Accordingly, Petitioner has not exhausted his administrative remedies, and judicial review of the July 14, 1997 order is not available.

This court lacks subject matter jurisdiction and must dismiss the petition for judicial review. See Varian-Eimac v. Lamoreaux, 767 P2d 569, 570 (Utah Ct. App. 1989)

Respondent seeks sanctions against Petitioner for filing a frivolous action in this court. Petitioner has filed numerous documents in this court, including letters pertaining to settlement negotiations and "Notices" of various allegations. Petitioner is here-by put on notice that filing such

materials in this court is inappropriate, particularly given the ongoing agency proceedings and this court's lack of subject matter jurisdiction. We deny the request for sanctions without prejudice to renew if petitioner continues to make meritless filings in this court.

"s/Judith M. Billings" Judge
"s/Pamela T. Greenwood Judge
"s/Norman H. Jackson" Judge

FILED
Utah Court of Appeals
Jul 2 - 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| Daniel Scott Cox | : | ORDER |
| Petitioner | : | |
| v. | : | Case No. 97021-CA |
| | : | |
| Utah State Industrial | : | |
| Commission; Proform | : | |
| Fitness/Weslo and/or | : | |
| Liberty Mutual | : | |
| Insurance Company | : | |
| Respondents | : | |

This matter is before the court upon petitioner's petition for rehearing, filed June 11, 1998.

IT IS HEREBY ORDERED that the petition for rehearing is denied

Dated this 2nd day of July, 1998.

FOR THE COURT:

"s/Norman H. Jackson" Judge

APPENDIX C


| EXHIBIT | DESCRIPTION | PAGE NO. |
|---|---|---|
| E | 30 October 1998 "Order" of Utah Supreme Court denying without comment Petitioner's Petition for Writ of Certiorari | 11a |

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| Daniel Scott Cox | : | |
| Petitioner | : | |
| vs. | : | No. 981422-SC |
| Utah State Industrial | : | 970721-CA |
| (Labor) Commission; | : | 961068 |
| Proform fitness/Weslo | : | |
| and/or Liberty Mutual | : | |
| Insurance Company | | |
| Respondent | | |

ORDER

This matter is before the Court upon a petition for writ of certiorari, filed pursuant to Rule 48, of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the petition for writ of certiorari filed on July 30, 1998 by the petitioner Daniel Scott Cox is denied.

FOR THE COURT;

OCT. 30 1998
Date

"s/Richard C. Howe'
Chief Justice

## APPENDIX D

Constitutional Provisions:

Article I, Section 11, Utah Constitution

> "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay, and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause in which he is a party."

Article I, Section 24, Utah Constitution

> "All laws of a general nature shall have uniform operation."

Article VIII, Section 3, Utah Constitution

> "The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any issue."

Amendment XIV, Section 1, U.S. Constitution

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Worker's Compensation Act Statutes:

UCA 35-1

"TITLE 35 LABOR - INDUSTRIAL COMMISSION ... CHAPTER 1, WORKERS' COMPENSATION"

UCA 35-1-44(7)

"'Order' means any decision, rule, regulation, direction, requirement or standard of the Commission, or any other determination arrived at, or decision made, by the Commission." 1995

UCA 35-1-82.53(1) & (2)

"(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge may seek review of that order with the Commission by complying with the Commission's rules governing that review." 1988

"(2) The order of the Commission on review is final, unless set aside by the Court of Appeals." 1988

UCA 35-1-82.55

"Repealed" 1987, 1988

UCA 35-1-86

> "The Court of Appeals has jurisdiction to review, reverse, or annul any order of the Commission, or to suspend or delay the operation or execution of any order." 1988

UCA 35-1-88

> "Neither the commission nor the hearing examiner is bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided or as adopted by the commission pursuant to this act. The commission may make its investigation in any manner as in its judgement is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act." 1965

Administrative Procedures Act Statutes:

UCA 63-46b-1(4)

> "This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding ... from ... (b) granting a timely motion to dismiss or for summary judgement if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party ..." 1996

UCA 63-46b-12

"(1)(a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order of the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule." 1988

"(6)(a) Within a reasonable time ... the agency or superior agency shall issue a written order on review." 1988

UCA 63-46b-13

"Agency Review - Reconsideration. (3)(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied." 1988

UCA 63-46b-14

"(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute." 1988

"(2) A party may seek judicial review only after exhausting all administrative remedies available, except that: (a) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if: (i) the administrative remedies are inadequate; or (ii)exhaustion of remedies would result

in irreparable harm disproportionate to the public benefit derived from requiring exhaustion." 1988

"(3)(a)A party shall file a petition for judicial review of final agency action within 30 days after the date that the Order constituting the final agency action is issued, or is considered to have been issued under Subsection 63-46b-13(3)(b)." 1988

UCA 63-46b-16

"(1) As provided by statute, the Supreme Court or Court of Appeals has jurisdiction to review all final agency action resulting from an adjudicative proceedings." 1988

Court Jurisdictional Statutes:

UCA 78-2-2(3)(a)

"(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over (a) a judgement of the Court of Appeals."

UCA 78-2-2(6)

"The Supreme Court shall comply with the requirements of Title 64, Chapter 46b, in its review of agency adjudicative proceedings."

UCA 78-2a-3(2)(a)

"(2) The Court of Appeals has appellate jurisdiction,

including jurisdiction of interlocutory appeals, over (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies..."

UCA 78-2a-3(4)

"The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings."

Utah Rules of Civil Procedure:

Rule 1, Utah R.Civ.P.

"These rules shall govern the procedure ... in all actions, suits and proceedings of a civil nature whether cognizable at law or in equity, and in all special statutory proceedings ... and except as stated in Rule 81. They shall be liberally construed to secure just, speedy and inexpensive determination of every action." 1987

Rule 11, Utah R.Civ.P.

"Every pleading, motion or other paper ... The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument ... If a pleading, motion or other paper is signed in violation of this rule,

the court, upon motion ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction."

Rule 37 Utah R.Civ.P.

"If a party or an officer, director, or managing agent of a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure are just ... In lieu of any of the foregoing orders or in addition there-to, an order treating as a contempt of the court the failure to obey any orders ... In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses ... caused by the failure..."

Rule 46 Utah R.Civ.P

"(d)(1) To Whom Awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as a course to the prevailing party." Rule 46 Utah Rules of Civil Procedure

Rule 56 Utah R.Civ.P.

"Summary Judgements. (c) The judgement sought shall be rendered forthwith if the pleadings ... answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the

moving party is entitled to a judgement as a matter of law...(e) When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgement, if appropriate, shall be entered against him." Rule 56 Utah Rules of Civil Procedure

Rule 65B(d)(2) Utah R.Civ.P.

"(d) Wrongful use of judicial authority or failure to comply with duty; (2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency or officer exercising judicial functions has exceeded its jurisdiction or abused discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station..."

Rule 81 Utah R.Civ.P.

"Applicability of rules in general. (a) These rules shall apply to all special statutory proceedings... (d) These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency..."

Worker's Compensation Rules:

R568-1-4(M), 1st Sentence

> "Any party to an adjudicative proceeding seeking review of an Order by the Agency may file a written request for review in accordance with the provisions of UCA 63-46b-12, 13, 14, 15, and 16, U.C.A."

R568-1-4(M), 2nd sentence

> "A Motion for Review of any order entered by an Administrative Law Judge may be filed pursuant to the provisions of Section 63-46b-12, U.C.A."

R568-1-4(N)

> "In formal adjudicative proceedings, the Industrial Commission, shall generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of subpoenas, except as the Utah Rules of Civil Procedure are modified by the express provisions of Section 35-1-88, U.C.A. ..."

R568-1-4(O) 2nd Sentence

> "Any petition for judicial review of the Commission's Order on Motion for Review shall be governed by the provisions of Section 63-46b-14, U.C.A.

Utah Rules of Appellate Procedure:

Rule 5 Utah R.App.P.

> "(a) Discretionary appeals from interlocutory orders..."

Rule 14 Utah R.App.P.

> "(a) ... a petition for review shall be filed with the clerk of the appellate court within the time prescribed by statute."

Rule 18 Utah R.App.P.

> "Applicability of other rules to review. All provisions of these rules are applicable to review of decisions or orders of agencies, except Rules 3 through 8 are not applicable."

Rule 46a Utah R.App.P.

> "Considerations governing review of certiorari. (a) Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following while neither controlling nor wholly measuring the Supreme Court's discretion, indicates the character of reasons that will be considered; (1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law; (2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court; (3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of

supervision; or (4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be settled by the Supreme Court."

Federal Statutes:

28 USCA $1257(a)

"Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where the validity of any State is drawn in question on the ground of its being repugnant to the Constitution ... of the United States..." 28 USCA $1257(a)

"Note that the section allows certiorari to review not just a decision of the "highest court" of a state, but of the highest state court "in which a decision could be had." That language ... takes note of the internal strictures a state may impose on appeals within its own court system, perhaps stopping a case at some lower level and barring it from review by the state's highest court, or, for that matter, from any appellate court at all. If the case never-the-less poses a federal question, review of it can be applied for to the U.S. Supreme court - solely by the certiorari route - from whatever court is has been able to reach within the state system. Suppose, for example, that State X has set up several tiers of appeal for a case commenced in a court of limited jurisdiction, but one of its internal appealability requirements has not been met - in

regard to the nature of the case, the stage it has reached, some required procedure, some time period, etc. - and the case can't be appealed at all under state law. If that case never-the-less poses a federal question, it can conceivably jump from the lowest court in the state to the highest court in the land through the good offices of $ 1257. It happened in Grovey v. Townsend, 295 US 45, 55 S. Ct. 622, 79 L.Ed 1292 (1935), for example, from a local justice court, and it continues to happen ..." Commentary, pg 97, 98

# APPENDIX E

Allred v. Utah State Retirement B., 914 P2d 1172 (Ct. App. 1996)

> "When interpreting statutes, this court is guided by the long-standing rule that a statute should be construed according to its plain language." 914 P2d 1175 Citing Utah Sign Inc., 896 P2d 632, 633-4 (Utah 1995)

Allen v. Ind. Comm., 729 P2d 15 (Sup. Ct. 1986)

> "An accident connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events ... This is not necessarily restricted to some single incident which happened suddenly at one particular time and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner as to properly fall within the definition of an accident." 729 P2d 18

> "It is clear, however, that our cases have defined 'by accident' to include internal failures resulting from both usual and unusual exertions." 729 P2d 19

> "Under medical causation portion of two part test ... claimant must show by evidence opinion or otherwise that stress, strain or exertion required by his or her occupation led to resulting injury or disability." 729 P2d 16

"To meet the legal causation requirement, a claimant with a pre-existing condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life ... If their is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the employment and causally connected with the (injury) as a matter of medical fact is adequate to satisfy the legal test of causation." 729 P2d 25 - 26

Amica Mut. Ins. Co. v. Schettler, 768 P2d 950 (Ct. App. 1989)

"... when the moving party has presented evidence sufficient to support a judgement in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial." 768 P2d 957

"It is fundamental that once the production of documents is demanded, a party is obligated to produce them unless he objects or moves for a protective order. Utah R. Civ.P. 37(d)." 768 P2d 962

"The following evidence was also before the court... (1) Schettler's attorney .. misrepresented himself..., (2) a court reporter testified that

Schettler attempted to intimidate witnesses Mr and Mrs Ware..., (3) attorney, Ed Flint, attempted to intimidate witnesses Mr and Mrs Smith ..., (4) both Schettler and Flint engaged in regular secretive taping of phone conversations ..., (5) Schettler and Flint attempted to intimidate witness Troy Murdock by coercing him to leave a restaurant parking lot with them and forcing him to sign an affidavit. They offered Murdock $1000 if he agreed not to appear at his deposition and $10,000 if he agreed to solicit a bribe from Amica's attorney, Ed Flint, attempted to further intimidate Troy Murdock by brandishing a revolver he kept in his brief case" 768 P2d 955

"The record in this case clearly demonstrates a pattern of aggravated misconduct in the form of willful and deliberate disobedience of discovery orders, fabricated testimony, and attempted witness tampering." 768 P2d 962

Aragon v. Clover Club Foods Co., 857 P2d 250 (Ct. App. 1993)

"Limitation periods begin to run when a cause of action has accrued, which occurs 'upon the happening of the last event necessary to complete the cause of action'." Citing Becton Dickinson & Co., 668 P2d 1254, 1257 (Utah 1983); Quoting Order of R.R. Telegraphers, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944) "This general rule may be subject to the 'Discovery Rule', such that the running of the statute of limitation is tolled until the plaintiff

discovers (or should have discovered) all of the facts that form the basis for the cause of action." 857 P2d 252

"The limitation period should not be allowed to run before the suit can be effectively filed." 857 P2d 253

Baker v. Ind. Comm., 405 P2d 613 (Sup. Ct. 1965)

"Purpose of Industrial Compensation Act is to alleviate hardships upon workers and their families." 405 P2d 613

Industrial Commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and act upon substantial, competent and credible evidence which is uncontradicted." 405 P2d 613

"This Court is committed to the rule that as a matter of law the Commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and act upon substantial, competent and credible evidence which is uncontradicted." 405 P2d 615

Barber v. Ind. Comm., 135 P2d 266 (Supreme Ct. 1943)

"Workmen's Compensation Act is intended to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents, and to afford injured workmen or their

dependents simple, adequate and speedy means of securing compensation." 135 P2d 266

Bateman v. Board of Examiners, 322 P2d 381 (Sup Ct. 1958)

"Where statutes are conflicting, the more specific takes precedence over general." 322 P2d 381, Citing University of Utah v. Richards, 20 Utah 457, 59 P2d 96

Becton Dickinson Co., v. Reese, 668 P2d 1254 (Sup. Ct. 1983)

"the general rule has been that a cause of action accrues upon the happening of the last event necessary to complete the cause of action." 668 P2d 1257

Bennion v. Sundance Development Corp., 896 P2d 1232 (Ct. App. 1995)

"It is the Court's duty to harmonize and reconcile statutory provisions, since the Court can not presume that the legislature intended to create conflict." 896 P2d 1235, Citing Madisen v. Brown, 701 P2d 1086, 1089-90

Berry by and Through Berry v. Beech Aircraft, 717 P2d 670 (Sup. Ct. 1985)

"To be constitutional, a statute of limitation must allow a reasonable time for the filing of an action after a cause of action arises." 717 P2d Pg 672, Citing Horn, 151 P2d 555 (1915)

"[Constitutionality] is satisfied if the law provides an injured person an effective and reasonable alternative remedy `by due course of law' for vindication of his constitutional interest..." 717 P2d 680 [citations omitted]

Blue Cross and Blue Shield v. State, 779 P2d 634 (Sup. Ct. 1989)

"We are not free to break out groups that might be distinguishable if the legislature has not." 779 P2d 638 Citing Crowder, 552 P2d 646 (Utah 1976); State v. Breed, 725 P2d 202, 205; Aetna Life Ins., 520 P2d 162, 165 n. 6

Borgnis v. Falk Co., 133 N.W. 209, 147 Wis. 327 (Wis. Sup. Ct. 1911)

"The Industrial Commission must, of course, decide these questions in any cases where they are raised; but it cannot decide them conclusively, for they are jurisdictional questions on which its right to act at all depends. They must be open to review in some court of competent jurisdiction; otherwise, the parties would be denied due process of law." 133 N.W. 219

Brendle v. City of Draper, 937 P2d 1044 (Ct. App. 1997)

"Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent, rather, we are guided by the rule that a statute should generally be construed

according to its plain language." 937 P2d 1047 Quoting Brinkerhoff, 779 P2d 685, 686 (Utah 1989)

"When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." 937 P2d 1047

"Although the trial court denied Draper City's Motion to Dismiss and treated the Lot Owners' complaint as a petition for review, its subsequent final ruling and order did not address all of the causes of action pleaded by the Lot Owners ... those causes of action not previously considered in the petition for review are remanded to the trial court for further appropriate proceedings, as may be needed." 937 P2d 1048 - 1049

Bunnell v. Ind. Comm., 740 P2d 1331 (Sup. Ct. 1987)

"... every person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal." 740 P2d 1333, Citing Anderson v. Ind. Comm., 696 P2d 1219, 1221 (Utah 1985)

"Fairness requires not only an absence of actual bias, but endeavors to prevent even the possibility of unfairness." 740 P2d 1333, Quoting Anderson v. Ind. Comm., 696 P2d 1221

Cox Broadcasting Corp. v. Cohn, 43 L.Ed 328; 420 US 469; 95 S Ct. 1029 (U.S. Sup. Ct. 1975)

"Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest court in which judgement could be had has rendered a "final judgement or decree"... But the Court has observed that the rule had not been administrated in such a mechanical fashion and that there were circumstances in which there had been "a departure from this requirement of finality for federal appellate jurisdiction... These circumstances were said to be "very few"... but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgement for the purposes of 28 USC $1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid `the mischief of economic waste and of delayed justice'." 43 L.Ed 2d 338 - 339

"In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the

case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The Court has taken jurisdiction in these circumstances prior to completion of the case in state courts." 43 L.Ed 2d 340, 341

De Baritault v. Salt Lake City Corp., 913 P2d 743 (Sup. Ct. 1996)

"If there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective and to harmonize its provisions in accordance with its intent and purpose." 913 P2d 746, Citing Clover, 808 P2d 1037, 1045 (In turn quoting Osuala, 608 P2d 242, 243)

"When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to be in harmony and to avoid conflicts." 913 P2d 747, Quoting Jerz 822 P2d 773 (Citing Murray City, 663 P2d 1314, 1319)

Deseret Sav. Bank v. Francis, 217 P 1114 (Ut. Sup. Ct. 1923)

"Upon other grounds the statute must be construed to be mandatory. When power is given by statute to public officers, in permissive language, the language used will be regarded as peremptory where the pub-

lic interest or individual rights require it should be. Supervisors v. U.S., 4 Wall 435, 18 L.Ed, 419; City of Galena v. Amy, 5 Wall 705, 18 L.Ed 560; Village of Kent v. U.S. 113 Fed 232, 51 C.C.A. 189; Southerland Stat. Const. $462; 4 Dillon Mun. Corp. (5th Ed.) $1515" 217 P 1115 - 1116

Dupler v. Yeates, 351 P2d 624 (Sup. Ct. 1960)

"Certainly, if the summary judgement procedure is to be effective, it must be held that when adequate proof is submitted in support of the motion, the pleadings are not sufficient to raise an issue of fact." 351 P2d 636

"where the moving party's evidentiary matter is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present at the trial." 351 P2d 637

"Upon a motion for summary judgement, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so." 351 P2d 637

"Where ... the materials presented by the moving party are sufficient to entitle him to a directed verdict and the opposing party fails to either to offer counteraffidavits or other materials that raise a credible issue ... summary judgement may be rendered for the moving party." 351 P2d 637

Engl v. Aetna Life Ins. Co., 139 F2d 469 (Sec. Cir. Ct. of App. 1943)

> "The Federal summary judgement proceeding ... is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgement where facts set forth in affidavits ... show that there are no genuine issues of fact to be tried.' ... The rationale is well stated in one of the leading cases establishing the constitutionality, Hanna v. Mitchell, 202 App. Div. 504, 518, 196 N.Y.S. 43, 55, affirmed 235 N.Y. 534, 139 N.E. 724; 'To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance.' Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgement. [Citations omitted]" 139 F2d 472 - 473

Flynt v. Ohio, 68 L.Ed 2d 489; 451 US 619; 101 S Ct. 1958 (U.S. Sup. Ct. 1981)

> "The Court has, however, in certain circumstances, treated state-court judgements as final for jurisdictional purposes although there were further proceedings to take place in the state court. Cases of this kind were divided into four categories in Cox Broadcasting Corp. v. Cohn, supra ... In the first

place, we observe in Cox that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgement on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues." Flynt v. Ohio, 68 L.Ed 2d 492

Fred Meyer v. Ind. Comm., 800 P2d 825 (Ct. App. 1990)

"Furthermore, to facilitate the purposes of the legislation, the Worker's Compensation Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the applicant." 800 P2d 828, Citing USX Corp. v. Ind. Comm., 781 P2d 883, 886; Kaiser Steel Corp., 631 P2d 892; McPhie v. Ind. Comm., 567 P2d 153

Gillespie v. United States Steel Corp., 13 L.Ed 2d 199; 379 US 148; 85 S Ct. 308 (U.S. Sup. Ct. 1964)

[in deciding the question of finality the most important competing considerations are] "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 13 L.Ed 2d 204

"But as this Court has pointed out, a decision 'final' within the meaning of $1291 does not necessarily mean the last order possible to be made in a case." 13 L.Ed 2d 203 Citing Cohn v. Beneficial Industrial Loan Corp., 337 US 541, 545; 93 L.Ed

1529, 1535; 69 S Ct. 1221

"We think that the questions presented here are equally fundamental to the further conduct of the case." 13 L.Ed 2d 204

Grace Drilling v. Ind. Comm., 776 P2d 63 (Ct. App., 1989)

"Under the UAPA, it is clear that the Board's findings of fact will be affirmed if they are 'supported by substantial evidence when viewed in light of the whole record before the Court'." 776 P2d 67

"Grace Drilling was given two opportunities to present the results and lay the appropriate foundation for receiving them into evidence. Grace declined on both occasions ... we do not believe granting parties 'three bites at the apple' is consonant with efficient administrative procedure. Grace Drilling had ample opportunity to present its case and failed to meet its burden." 776 P2d 70

Grovey v. Townsend, 79 L.Ed 1292, 295 U.S. 45 - 55 (U.S. Sup. Ct. 1935)

Our jurisdiction is clear, as the Justice Court is the highest state court in which a decision could be had, and the validity of the constitution and statutes of the state was drawn in question on the ground of their being repugnant to the Constitu-

tion of the United States." 79 L.Ed 1293, 1294 Citing Downham v. Alexandria, 9 Wall. 659, 19 L.Ed 807; Tinsley v. Anderson, 171 U.S. 101, 43 L.Ed 91, S. Ct. 805

Harmon v. Odgen City Civil Service Commission, 890 P2d 4

"The courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed." 890 P2d 6, Citing Barrette, 876 P2d 367, 370 (Utah 1994)

"In determining the meaning of this statute, 'we look first to the plain language'." Pg 6, Quoting K & T 254 Utah Ad. Rep. 3.4 (Utah 1994)

Herr v. Salt Lake County, 525 P2d 728 (Sup. Ct. 1974)

"We thing the county commission should abide by its own ordinance which says it shall make its decision within seven days after the hearing, and if it fails so to do, it loses its jurisdiction." 525 P2d 729

In Re Owens' Estate, 85 P 277 (Sup. Ct. 1906)

"Where a statute confers authority to do a judicial, or indeed, any other act, which the public in-

terest or even individual right may demand, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application. In giving one person the authority to do an act the statute impliedly gives to others the right of requiring that the act be done, the power being given for the benefit not of him who is invested with it, but of those for whom it is to be exercised. The Legislature in such cases imposes a positive and absolute duty, and not merely gives a discretionary power; and it must be exercised upon proof of the particular facts out of which the power arises. When, there, the language in which the authority is conferred is only directory, permissive or enabling, for instance, when it is enacted that the person authorized "may" or "shall if he deems it advisable", or that "it shall be lawful" for him to do the act, it has been so often decided as to have become an axiom that such expressions have a compulsory force..." 85 P 279 With reference to Supervisors v. United States

In Re Utah Savings and Loan Association, 442 P2d 929 (Sup. Ct. 1968)

"It is true, here, as it is in so many areas of the law, that one statute has been enacted at one time with a particular purpose in mine, and that another has been enacted at another time with a different purpose in mine. When this has been done and

there is an apparent conflict, it is not proper to put all the emphasis to one statute, as though it stated all of the law on the subject to the exclusion of the other. They should be looked at together, in their relationship to each other, with a view to reconciling any such apparent conflict and giving each its intended effect insofar as that can be accomplished without nullifying the other." 442 P2d 932

"One act is not to be allowed to defeat another, if by reasonable construction the two can be made to stand together." 442 P2d 932 N. 1, Citing University of Utah v. Richards, 20 Utah 457, 59 P 96 with reference also to Western Beverage Co. of Provo, Utah v. Hansen et. us., 98 Utah 332, 96 P2d 1105

James v. Honaker Drilling Co., 254 F2d 702 (Tenth Cir. Ct. Ap. 1958)

"Rule of Civil Procedure 56, 28 U.S.C. authorizes the entry of summary judgement when it affirmatively appears from the pleadings, ... affidavits, if any, that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law... if it appears that there is no genuine issue as to any material fact upon which the outcome of the litigation depends, the cause is appropriate for disposition by summary judgement and the court should enter such judgement. Broderick Wood Products Co. United States, 10 Cir., 195 F2d 433; SMS Mfg. Co v. U.S.

Mengle Plywoods, 10 Cir., 219 F2d 606. And where the moving party presents affidavits ,,, which taken alone entitle him to a directed verdict, if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence that he can adduce which may reasonably change the result. Zampos v. United States Smelting, Refining and Mining, 10 Cir., 206 F2d 171." 254 F2d 706

Jensen v. IHC Hospitals, Inc., 944 P2d 327 (Sup. Ct. 1997)

"When we are faced with two statutes that proport to cover the same subject, we seek to determine the legislatures intent as to which applies. In doing this, we follow the general rules of statutory construction, which provide both that 'the best evidence of legislative intent is the plain language of the statute'. Sullivan v. Scoular Grain Co., 853 P2d 877, 879 (Utah 1993) Citing Jensen v. Intermountain Health Care, Inc., 679 P2d 903, 904 (Utah 1984), and that 'a more specific statute governs instead of a more general statute"' De Baritault v. Salt Lake City Corp., 913 P2d 743, 748 (Utah 1996) (Quoting Pan Energy v. Martin, 813 P2d 1142, 1145 (Utah 1991) (Citations omitted)." 944 P2d 331

"On a motion for summary judgement, the moving party bears the burden of proof for its motion, namely, the burden of proving that there is no genu-

ine issue as to any material fact and that the moving party is entitled to judgement as a matter of law. However, in opposing a motion for summary judgement, the plaintiff still has the ultimate burden of proving all the elements of his or her cause of action... Further, once challenged, the party who opposed such a motion must come forward with sufficient proof to support his or her claim, particularly when that party has had an opportunity to conduct discovery... The party opposing a properly supported motion for summary judgement 'may not rest upon the mere allegations or denials of his [or her] pleadings, but his [or her] response, by affidavit or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial...' Put another way, once the moving party had brought forth evidence either tending to prove the lack of a genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of proving some evidence, by affidavit or otherwise, in support of the essential elements of his [or her] claim." 944 P2d 339

Jerz v. Salt Lake County, 822 P2d 770 (Sup. Ct. 1991)

"It is our duty to construe the act of the legislature so as to give it full force and effect. When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to

be in harmony and avoid conflicts." 882 P2d 773

Johnson v. Britton, 290 F2d 355 (U.S. Ct. App., Dist. Col. 1961)

> "Compensation Acts, to be within constitutional limits, must not be arbitrary, unreasonable, or fundamentally unjust or oppressive." 290 F2d 359, Citing Marshall v. Mahony

Johnson v. Ind. Comm., 87 N.W.2d 822, 3 Wis.2d 173 (Wis. Sup. Ct. 1958)

> "The Constitutionality of the Workmen's Compensation Act depends upon the right of judicial review to determine whether the findings are supported by evidence." 87 N.W.2d 826, Citing Borgnis v. Falk Co., supra [(1911), 147 Wis. 327, 133 N.W. 209, 37 L.R.A. N.S., 489]

Jones v. California Packing, 244 P2d 640 (Sup. Ct. 1952)

> "Where facts are proved by uncontested testimony of competent disinterested witnesses in a compensation proceeding and there is nothing inherently unreasonable, nor any circumstance which would tend to raise doubt of its truth, it should be taken as established and refusal to do so is an arbitrary disregard by the trier of facts." 244 P2d 640

> "Under the Workmen's Compensation Act, the Industrial Commission has no arbitrary power to dis-

believe or disregard uncontradicted, competent, credible evidence." 244 P2d 641

Marshall v. Andrew F. Mahony, 56 F2d 74 (U.S. Ninth Cir. Ct. App. 1932)

> "Compensation Acts to be within constitutional limits, must not be arbitrary, unreasonable, or fundamentally unjust or oppressive." 56 F2d 78

Merton v. Ind. Comm., 50 N.W.2d 42; 260 Wis. 109 (Wis. Sup. Ct. 1951)

> "The constitutionality of the Workmen's Compensation Act depends upon the right of judicial review to determine whether the findings are supported by evidence" 50 N.W. 2d 46, Citing Borgnis v. Falk Co., supra.

Meyers v. McDonald, 635 P2d 84 (Sup. Ct. 1981)

> "the general rule is that a cause of action accrues upon the happening of the last event necessary to complete the cause of action [11 citations omitted] ... There are a number of exceptions to this general rule. In some enumerated areas of the law, our Legislature has adopted the discovery rule by statute so that the limitations period does not begin to run until the discovery of facts forming the basis for the cause of action [Citations omitted]. ... Finally, without regard to wrongdoing on the part of the defendant, the courts of some states have adopted the discovery rule by judi-

cial action as to exceptional circumstances or causes of action where application of the general rule would be irrational or unjust [Citations omitted]." 635 P2d 86

"We should be careful not to encroach on legislative prerogative. However, there may well be a denial of constitutional rights in foreclosing persons from access to the court under these unusual circumstances. Besides the constitutional guarantees of due process and equal protection of the law, our Utah Constitution, Article I, Section 11 provides that "All courts shall be open, and every person for an injury done to him in person ... shall have remedy by due course of law which shall be administered without denial..." 635 P2d 88 Justice Howe concurring_

Milkovich v. Ind. Comm., 64 P2d 1290 (Sup. Ct.)

"Industrial Commission cannot compel certain sorts of evidence, but must take cases as they are presented with such evidence as nature of case permits, and from such evidence come to its conclusion, rather than from fact that certain type of evidence, presentation of which it makes condition precedent is not forthcoming." 64 P2d 1290, 1292

Nyrehn v. Industrial Commission, 800 P2d 330 (Ct. App. 1990)

"Failure of agency to make adequate findings of fact on material issues renders its findings arbitrary and capricious unless the evidence is clear, uncontroverted,

and capable of only one conclusion." 800 P2d 330

"The failure of a trial court to make adequate findings of fact on material issues is reversible error." 800 P2d 335

"Likewise, the failure of an agency to make adequate findings of facts on material issues renders its findings arbitrary and capricious." 800 P2d 335

Order of R. Telegraphers v. Railway Exp. Agency, 88 L.Ed 789 (U.S. Sup. Ct. 1943)

"A State statute of limitations can hardly destroy a claim because the period of actual contest over it in a Federal tribunal extends beyond the limitation period. Statutes of limitations, like the equitable doctrine of latches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigations shows no evidence of reckless haste on the part of either, party, it cannot be said that the claims were not timely pursued. Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed. We find no basis for ap-

plying a state statute of limitations to cut off the right of the Adjustment Board to consider the claims or to absolve the courts from the duty to enforce an award [Where the case had gone through multiple jurisdictions with separate statutes of limitations]. 88 L.Ed 792, 793

Pan Energy v. Martin, 813 P2d 1142 (Sup. Ct. 1991)

"Well established principles of statutory construction require that a more specific statute governs instead of a more general statute." 813 P2d 1145, Citing State Ex. Rel. Pub. Serv. Comm' v. Southern Pac. Col 79 P2d 25, 38 (1938); 82 C.J.S. Statutes $347(b) (1953)

Park Utah Consol. Mines Co., 36 P2d 979 (Sup. Ct. 1934

"Compensation Act affords injured industrial workmen or their dependents, through administrative bodies, simple adequate and speedy means of securing compensation to end that cost may be taxed against industry..." 36 P2d 979, (See also Utah Fuel Co., 194 P 122; Salt Lake City, 199 P 152; Globe Grain and Milling Co., 193 P 642; Utah Copper Co., 193 P 24; Americal Fuel Co., 187 P 633; Retuna, 185 P 535; Amalgamated Sugar Co., 286 P 959; Industrial Commission v. Agee, 189 P 414)

Pearce v. North Dakota Workmen's Compensation Bureau, 274 N.W. 2d 587 (N.D. Sup. Ct. 1937

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the Act before us, or in equivalent language - whenever the public interest or individual rights call for its exercise - The language used, though permissive, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the repository to meet the demands of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all cases, it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but it imposes 'a positive and absolute duty'." 274 N.W. 2d 590, Citing Supervisors v. United States

Salt Lake City v. Ohms, 881 P2d 844 (Sup. Ct. 1994)

"... when a proper challenge to the constitutionality of a given statute is made, the said statute must be examined to determine if it is unconstitutional either on its face or as applied." 881 P2d 847, (Citing In Re Criminal Investigation, 7th Dist. Court No. ES-1, 754 P2d 633, 640 (Utah 1988); Wells v. Children's Aid Soc. of Utah, 681 P2d 199, 204 (Utah 1984); Ellis v. Social Serv. Dept of Church of Jesus Christ of Latter-day Saints, 615 P2d 1250, 1255 (Utah 1980))

Savage v. Educators, 908 P2d 862 (Sup. Ct. 862-863)

> "Claimant sued employer's worker's compensation insurance carrier for breach of covenant of good faith and fair dealing in processing her claim... The Supreme Court, Zimmerman, C.J., held that claimant could not bring action against employer's carrier for breech of contractual covenant of good faith and fair dealing in adjusting claim, since claimant was not in privity with carrier" 908 P2d 863, 863

Spencer v. Ind. Comm., 40 P2d 188 (Sup. Ct. 1935)

> "commission cannot, without cause, disregard uncontradicted evidence or arbitrarily refuse to believe and act upon credible evidence which is unquestioned and undisputed in making it findings." 40 P2d 189

State v. Finch, 315 P2d 529 (Id. Sup. Ct. 1957)

> "It should be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of a property right. Such is the full exercise of judicial power, and such power in this state can be exercised only by one of the enumerated courts." 315 P2d 532, (Citing Big Butte v. State Board of Education, 78 Idaho 602, 308 P2d 225, 229 & Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P2d 457)

"... in conjunction with hearings before administrative boards of this kind unless an appeal is provided therefrom to a court, even though the scope of review be limited, due process is not satisfied. Zachos v. Huiet, 195 Ga. 780, 25S.E.2d 806; Precision Castings Co. v. Boland, supra [D.C., 13 F.Supp. 877, 2 Cir., 85 F2d 15]; Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399: Miller v. Price, 282 Ky. 611, 139 S.W.2d 450; Union Indemnity Co. v. Saling, 166 Okl. 133, 26 P2d 217" 315 P2d 533

St. Joseph Stock Yard Co. v. United States, 80 L.Ed 1033; 298 US 38 - 94 (U.S. Sup. Ct. 1936)

"When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained." 80 L.Ed 1041

"Legislative agencies, with varying qualifications work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and

receiving evidence. But to say that their findings of fact are conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously impair the security inherent to our judicial standards." 80 L.Ed 1041

"The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the government) ... there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claim it." 80 L.Ed 1054 Brandeis concurring

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which the facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgement of a court on the ultimate question of constitutionality." 80 L.Ed 1058 Brandeis concurring

Strand v. Hansen, 614 F2d 572 (U.S. Ct. App., 7th Cir.)

"Compensation Acts, to be within constitutional limits, must not be arbitrary, unreasonable, or fundamentally unjust or oppressive." 614 P2d 576, Citing Marshall v. Mahony

Supervisors v. United States, 18 L.Ed 419; S.C. Wall 435 - 447; 71 US 435 (U.S. Sup. Ct. 1867)

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the Act before us, or in equivalent language - whenever the public interest or individual rights call for its exercise - The language used, though permissive, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given not for their benefit but for his. It is placed with the repository to meet the demands of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all cases, it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but it imposes 'a positive and absolute duty'." The Board of Supervisors of Rock Island County v. United States on the Relation of the State Bank, 18 L.Ed 423 (U.S. Sup. Ct. 1847)

Taslich v. Ind. Comm., 262 P 281 (Sup. Ct. 1927)

"The whole scheme of Workmen's Compensation Act is designed to work out a speedy adjustment

and payment of claims for Industrial accidents in a summary and simple manner." 262 P 283

Tice v. State Ind. Acc. Comm., 195 P2d 188 (Or. Sup. Ct. 1948)

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the Act before us, or in equivalent language - whenever the public interest or individual rights call for its exercise - The language used, though permissive, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the repository to meet the demands of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all cases, it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but it imposes 'a positive and absolute duty'." 195 P2d 192, Citing Supervisors v. United States

TXO Production v. Alliance Resources, 125 L.Ed 2d 366, 509 US 443, 113 S Ct. 2711 (U.S. Sup. Ct. 1993

> "That TXO acted in bad faith by advancing a claim on those rights on the basis of a worthless quitclaim deed in an effort to renegotiate its royalty arrangement with alliance ... and that TXO had engaged in similar nefarious activities in other

parts of the country." 125 L.Ed 2d 370

United States v. Dowd, 180 F2d 212 (U.S. Ct. App., 7th Cir. 1950)

> "We hold that when petitioner was denied the right to appeal within the statutory period, he was deprived of a substantial right." 180 F2d 215

> "The court also properly found that the petitioner has exhausted his state remedies... for no corrective procedure is provided by the State, or if afforded is not available." 180 F2d 215

United States v. Richmond, 279 F2d 170 (U.S. Ct. App., 2nd Cir. 1960)

> "..the State Court denying the writ is the "Highest Court Of the State in which a decision could be had" within the meaning of 28 U.S.C.A. $1257. We think it plain that in such a case the Supreme Court would have power to review the judgement of such a court. Canizio v. People of State of New York, 327 U.S. 82, 66 S.Ct. 452, 90 L.Ed 545; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Edition 1951), Sec. 50 .... If on application, the statutory certificate had been denied, the road to the Supreme Court of the United States would have been clear." 279 F2d 172

VanDYKE v. Mountain Coin Machine Distributors, Inc., 758 P2d 962 (Ut Ct. App. 1988)

"We agree with the trial court that the conduct was particularly egregious because it was 'deliberate misconduct done under the advise [sic] of an attorney'." 758 P2d 966

Varian-Eimac v. Lamoreux, 767 P2d 569 (Ct. App. 1989)

"The 15 day time limit for filing motion for Industrial Commission's review of administrative law judge's decision was mandatory and jurisdictional; Commissions jurisdiction terminated upon expiration of time limit." 767 P2d 569

"Such motion for review must be filed within 15 days of the date of any order of the administrative law judge or commission ... Utah Code Ann. $35-1-82.55 (1987) (Effective until Jan. 1 1988)." 767 P2d 570 n. 1

BUT THE 15 DAY TIME LIMIT IS NOT APPLICABLE TO PETITIONER'S CASE BECAUSE THE 15 DAY TIME LIMIT WAS REPEALED

Warren v. Indiana Telephone Co., 26 N.E.2d 399, 217 Ind. 93 (Ind. Sup. Ct. 1940)

"As an administrative agency, the board is properly vested with power to determine facts, and the exercise of that power meets the requirements of due process of law, so far as the function of determining facts is concerned. It is not necessary to the

exercise of due process that the facts be determined by a court, so long as there is provided or exists an opportunity for a judicial review." 26 N.W.2d 404

"The Constitutional guaranty of due process is one of broad and comprehensive implications, not readily definable with precision. Among its elements are reasonable notice, an opportunity for a fair hearing, and the right to have a court of competent jurisdiction determine if the findings is supported by evidence." 26 N.W. 401, 409

Whitmer v. City of Lindon, 943 P2d 226 (Sup. Ct. 1997)

"Moreover, where Whitmer bases his claims on both the United States and Utah Constitution, we need not reach questions of federal Constitutional law. 943 P2d 228 Citing City of Logan v. Utah Power & Light Co., 796 P2d 697, 700 n. 6 (Utah 1990); Mountain Fuel Supply Co. v. Salt lake City Corp., 752 P2d 884, 890 (Utah 1988) holding that where level of protection under state constitution meets or exceeds federal standards, there is no need to reach federal constitutional challenges when we can reach decision under Utah Constitution.

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa Sup. Ct. 1996)

"Sufficient evidence ... supported punitive damage claim ... arising from false statements of company's nurse to physician treating company employee ... nurse maliciously manipulated employee's medical

treatment for purposes of financial profit for herself and company, that company actively sought ultraconservative physicians to avoid surgery costs and hired investigators to spy on injured workers..." 558 N.W.2d 134, 143, 144

Wilson v. Iseminger, 46 L.Ed 804, 185 U.S. 55, 62, 22 S. Ct 573 (U.S. Sup. Ct. 1902

> "It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute cannot bar the existing rights of claimant without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might by the purport of its provisions." 46 L.Ed 807

> "This court has often decided that statutes of limitations affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. [Citations omitted]" 46 L.Ed 807

Wilstead v. Ind. Comm., 407 P2d 692 (Sup. Ct. 1965)

> "Purpose underlying Workmen's Compensation Act are to assure injured employee and his dependents income during period of total disability and to provide compensation for any resulting permanent disability, to accomplish this by simple, and speedy

procedure eliminating the expense, delay and uncertainty in having to prove negligence on part of employer, and to thus require industry to bear burden of injuries suffered." 407 P2d 692

99 C.J.S. Worker's Compensation, f. Construction of Acts, pg 125 - 128

"The act must, or should, be construed, or considered, as a whole, or must, or should be construed, or considered, as an entirety, in an effort to harmonize its terms ... they should be read together, and, if possible, harmonized and reconciled ... Provisions dealing with the same general subject matter should, or must, be read and construed together, and if possible, provisions dealing with the same general subject matter should be harmonized, and given effect; and conflicting provisions must be reconciled as far as possible, in accordance with the general legislative purpose or intent. General provisions yield to special ones, and the last or latest, legislative expression controls." [Citations omitted]

99 C.J.S. Workmen's Compensation, $20, pgs 120, 121

"judicial legislation, as by reading, or writing new provisions into, or adding to, the act, especially when so to read would be contrary to the spirit and intent ... or supply a special limitation which would curtail the operation of the act." 99 C.J.S. Workmen's Compensation, Pgs 120 & 121 [Citations Omitted]

APPENDIX F


| EXHIBIT | DESCRIPTION | PAGE NO. |
|---|---|---|
| F | Table of 15 Motions from Revised Docketing Statement of 2 March 1998 Submitted To The Court of Appeals Here-in Submitted To The U.S. Supreme Court for Award | 59a |
| G | Extract of 32 alleged acts of misconduct by Respondents as cited to the Utah Supreme Court | 65a |
| H | Extract from Respondents 21 February 1999 Letter | 71a |

EXHIBIT F

TABLE OF MOTIONS NOW BEFORE THIS COURT
EXTRACTED FROM DOCKETING STATEMENT
TO COURT OF APPEALS

The additional motions of October 1997 are as follows:

(1) Petitioner's Uncontested Motion for Sanctions in the amount of $1,000,000 for Respondents concealment of "Material" records from Dr. Able in order to obtain a medical opinion favorable to Respondents assertion of a non-existant Pre-existing anxiety condition, and Respondents use of this medical opinion in support of their 7 March 1997 Motion to Dismiss where-in they knowingly, intentionally and maliciously sought to improperly deny Petitioner his right to compensation to which he was otherwise entitled.

(2) Petitioner's Uncontested Motion for Sanctions in the amount of $5,000,000 for conspiracy on the part of various individuals who as officers, agents or high managerial agents; failed to disclose "Material" evidence, made false statements, made false representations, suppressed evidence, improperly interpreted statutes, improperly applied statutes, violated Commission "Orders", improperly delayed petitioner's hearing, refused to release UOSH allowed records in violation of UOSH statutes and/or regu-

lations, violated pleading/discovery rules and/or Worker's Compensation rules for Answers, improperly asserted Respondents investigation was thorough, proper and in compliance with Utah laws, and/or failed to take action when informed of "Bad Faith Practices" or "Fraudulent Acts".

(3) Petitioner's Uncontested Motion for costs in an amount now exceeding $396,000 for the activities necessary to defend against Respondents use of "Bad Faith Practices" and/or "Fraudulent Practices" in the denial of Petitioner's compensability.

(4) Petitioner's Uncontested Motion for Daily Sanctions in the amount of $1000 per day for Respondents concealment of "Material" evidence relating to his exposure to "Unsafe" levels of toxic welding fumes from 11 March 1996 to 28 February 1997 when Petitioner moved for Interrogatories, or $350,000.

(5) Petitioner's Uncontested Motion for Investigation into the practices of Respondents regarding Independent Medical Examinations.

(6) Petitioner's Uncontested Motion for Disbarment Proceedings against Respondents Counsel.

(7) Petitioner's Uncontested Motion for Daily Sanctions in the amount of $1000 per day for Respondents refusal to release Interrogatories as "Ordered" by the Commission on 11 March 1997 thru 12 January 1998, or $270,000, where the daily sanctions are consistent with UCA 35-1-39 & 40 which provide that every day Respondents fail to comply with an "Order" of the Commission constitutes a

separate misdemeanor violation.

The above motions are in addition to those now before the Court of Appeals for Review, Reversal and Award as restated below to specify the amounts involved:

(8) Petitioner's Uncontested Motion for Summary Judgement of 8 March 1997 regarding his right to Worker's Compensation benefits in the approximate amount provided below:

| | |
|---|---|
| * $3,471.83 | Medical, prescriptions, mileage etc, per UCA 35-1-45 |
| * $11,532.42 | Temporary Partial Disability from 12 March 1996 thru 22 March 1997 when terminated, per UCA 35-1-65.1 |
| * $4,839.41 | Temporary Partial Disability form 23 March 1997 thru 31 December 1997 when Petitioner finally ob tained a job of comparable income to his welding job he had on 11 March 1996, per UCA 35-1-65.1 |
| * $1,994.07 | Interest @ 8% per year |
| * $7,668.96 | Impairment at 5% whole body (Es timate required because Respon dents refuse to release information required for medical determination) |

(9) Petitioner's Uncontested Motion for Sanctions of 8 May 1997 for Respondents Falsifications of Fact in the amount of $1000.

(10) Petitioner's Uncontested Motion for Sanctions of 8 May 1997 for Respondents False Representations of Petitioner's father's medical history as being that of Petitioner in the amount of $500.

(11) Petitioner's Uncontested Motion for Sanctions of 8 May 1997 for Respondents False Representations of 8 May 1997 regarding Petitioner's 7th grade symptoms in the amount of $100.

(12) Petitioner's Uncontested Motion for Sanctions of 8 May 1997 regarding Respondents intentionally presenting subjective medical statements without demonstrating with "Medical Evidence" any relationship to Petitioner's alleged anxiety condition in the amount of $100.

(13) Petitioner's Uncontested Motion for Sanctions of 8 May 1997 for suppressing evidence critical to the fair adjudication of Petitioner's Inhalant Injury and unfairly limiting evidence strictly to "Medical Evidence" in the amount of $500.

(14) Petitioner's Uncontested Motion for Sanctions of 8 May 1997 for Respondents failure to support discovery where-in they failed to provide Interrogatories, the duplicate hair sample, and failed to schedule specialist examinations and/or refused to notify the court that they did not intend to schedule such examinations in the amount of $100.

(15) Petitioner's Uncontested Motion for Sanctions of 24 June 1997 for Respondents refusal to obey the "Order"

of the Commission to produce interrogatories from 1 July 1997 thru 6 August 1997 in the amount of $100 per day or $3,600.

It is noted for the record, that Petitioner's Motions for Sanctions began in an attempt to force the Respondents into cooperation with Discovery, and became progressively more severe when it became apparent that they intend to defy all efforts to elicit their cooperation and as it became more apparent the extent of their duplicity.

The grounds for inclusion of these seven additional Uncontested Motions are fundamentally identical to those on the initial appeal:

* The Commission has abused their discretionary authority under the statutes by failing to disposition of motions made in a timely manner such that Petitioner can understand the nature and progression of the case (UCA 63-46b-16(4)(h)(i).

* Each Motion is Uncontested by Respondents, is properly supported by facts and arguments which are undisputed, unquestioned and uncontested, and the agency's refusal to rule is therefore arbitrary and capricious (UCA 63-46b-116(4)(h)(iv).

* The whole record before the Commission leads to only one single undisputable conclusion which is that Respondents actions regarding each Motion are as alleged or may reasonable be inferred to be as alleged, and thus the Motions are consis-

tent with the Whole Record Before The Commission (UCA 63-46b-16(4)(g).

In addition, their inclusion is appropriate because they are Motions which parallel and result from the central issue of Petitioner's Appeal which is his Uncontested Motion for Summary Judgement, which if decided in favor of Petitioner would otherwise require remanding to the Commission for final disposition of these seven residual Uncontested Motions. Such a remanding would be inefficient use of judicial and administrative resources given that the Motions are Uncontested and are inseparabley related from the motions now on appeal.

EXHIBIT G

TABLE OF ALLEGED MISCONDUCT
Information extracted from table filed
with
the Utah Supreme Court

| Act | Event Date | Misconduct Description |
|---|---|---|
| 1 | 02/94 Thru 11/96 | Knowingly Maintaining An Unsafe Work Place |
| 2 | 3/11/96 | Withholding Prompt Medical Treatment |
| 3 | 3/11/96 Thru 3/12/96 | Withholding and Destruction of Evidence |
| 4 | 6/20/96 | Improper Denial Of Compensability Sent By U.S. Mail |
| 5 | 7/20/96 | Obtaining A Medical Diagnosis Under Fraudulent Pretenses For The Purpose Of Improperly Denying Appellant's Worker's Compensation Benefits |
| 6 | 11/02/96 | Denial Of Compensability On Fraudlent Grounds By Letter Sent Via. U.S. Mail |
| 7 | 11/13/96 | Abuse of Process For Failure To com- |

| | | |
|---|---|---|
| | | pensate After Meeting Where Grounds For Denial Of Compensability As Cited In Appellees 11/02/96 Letter Were Without Merit |
| 8 | 12/13/96 | Abuse Of Process Where Appellees Answer Violated Rules, Failed To Defend, And Forced Appellant To sustain Litigation |
| 9 | 12/13/96 | Improper Private Communication With Judge Sims Regarding My Claim Before The Commission |
| 10 | 2/12/97 | Submission Of False Statement To Judge George In Attempt To Obtain Dismissal Under R568-1-4(H) For Alleged Refusal To Cooperate |
| 11 | 2/21/96 | Abuse Of Process Where Appellees Fail To Take Corrective Action After Notification Of "Bad Faith Practices" or "Insurance Fraud" |
| 12 | 3/7/97 | Submission Of False Written Statement To The Commission In form Of Appellees Motion To Dismiss Via U.S. Mail Citing:<br>* Fraudulent Diagnosis (Act 5 Above)<br>* False Statement That Appellant "Admitted" He Had "Refused" To Be Examined Be Examined By The U Of U Toxicologist (Act 10 Above) |

| | | |
|---|---|---|
| | | * Repeat Of Fraudulent Grounds Cited Be Appellees In Their 2 October 1996 Letter Of Denial Of Compensability (Act 6 Above) |
| 13 | 3/11/97 | Orally Offering Motion To Dismiss For Ruling By Judge George After Having Been Provided Letters From Dr. Avery and Appellant's Psychologist S. Winger Which Refuted The Basis Of The Motion To Dismiss, And Before Appellant's 10 Day Reply Time Had Expired. |
| 14 | 3/11/97 | Participation In An Improper Private Meeting With Judge George In Chambers Without Opposing Counsel [Daniel Cox] Being Present |
| 15 | 3/11/97 | Inference Of Special Relationship With Commission |
| 16 | 3/21/977 | Discriminatory Termination And Termination To Deny Appellant Of Discovery Ordered By Judge George |
| 17 | 4/3/97 | Failure To Attend Deposition After Scheduling It With Appellant |
| 18 | 4/9/97 | Abuse Of Process For Failure To Compensate After U of U Toxicologists |

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|---|---|---|
| | | Issued Their Medical Opinion Supporting Compensability Where Mr. Libby Of Liberty Mutual Had Committed To Compensate On 15 November 1996 |
| 19 | 4/18/97 Thru Present | Refusal To Release Interrogatories And Refusal To Obey Order Of Judge George To Release Interrogatories |
| 20 | 4/18/97 | Abuse Of Process Where Appellees Fail To sustain Their Motion To Dismiss; Fail To Oppose Appellant's Motion For Summary Judgement; Fail To File Any Affidavit Raising Material Issues Of Fact; While forcing Appellant To Maintain Litigation |
| 21 | 5/20/97 | Suborning Perjury By Payment Of Hospital Bill claimed To Be No Owed To IHC Whose Doctors Records They Misrepresented, And Whose Doctors Would Be Called To Testify |
| 22 | 7/23/97 | Failure To Release Evidence Moved For On This Date |
| 23 | 8/4/97 | Failure To Comply With Order Of Judge George Dated 14 July 1997 |
| 24 | 3/11/96 To 7/31/97 | Concealment Of "Unsafe" Welding Conditions; Over-exposure To Toxic Welding Fumes In Excess Of UOSH Safe Limits; Interference With Medical |

| | | |
|---|---|---|
| | | Examinations, Diagnosis And Treatments |
| 25 | 9/11/97 | Failure To Release Records Allowed By UOSH Regulations |
| 26 | 3/12/97 To 10/1/97 | Dilatory Action To Delay Hearing And Interference With Scheduling Of Hearing |
| 27 | Oct 97 | Abuse Of Process Where No Action Has Been Taken To Correct Illegal Practices After They Were Brought To The Attention Of High Management Personnel At Appellant's Employer, Their Insurer And Their Legal Counsel |
| 28 | 10/11/97 To Present | Refusal To Release UOSH Records After Proper Motion For Discovery |
| 29 | 1/12/97 | Appellees Submission Of Backdated Evidence Package To Mitigate 270 Daily Misdemeanor's For Refusing To Comply With Judge George's Order To Release Interrogatories,; Also Contained Altered Records To Dispute Records Filed With UOSH In 1996 Which Showed That Appellant Had Been Working At An "Unsafe" Work Station The Night Of His 3/11/96 Injury; Certificate Of Service, Unlike Others Filed By Appellees Does Not Declare The Data Package To Be "True And Correct" (False Written Statement |

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|---|---|---|
| | | - Sent Via U.S. Mail) |
| 30 | 1/30/98 | False Statement To Court Of Appeals Impuning Appellant's Honesty and Integrity In An Attempt To Obtain Dismissal Of Appellant's Petition Via U.S. Mail |
| 31 | 2/05/98 | Settlement Letter Implying Power To Have Court Of Appeals Sanction Appellant As Coercement To Accept Unreasonable Settlement Offer |
| 32 | 8/31/98 | Response Brief To Supreme Court Which Is Harassment, Frivolous, Without Merit and Contained False Statements and/or Representations Via U.S. Mail |

EXHIBIT H

This exhibit presents the relevant contents of a letter form Liberty Mutual in Response to Petitioner's letter of 6 February to Mr. Mansfield, the Corporate General Counsel of Liberty Mutual, where-in Petitioner reviewed in detail the alleged "Bad Faith Practices" being used against Petitioner, and characterized them as "Insurance Fraud". [Letter filed with Commission on 8 November 1997]

"February 21, 1997"

"Dear Mr. Cox;"
"This letter is in response to your correspondence dated 02/06/97 and addressed to Mr. Chistopher Mansfield of Liberty Mutual ... With regard to your comments in paragraph's 2-5 of your letter, Liberty Mutual vigorously denies your allegations of "Bad Faith Practices" and improprieties. Liberty Mutual, it's staff and counsel associated with this case have conducted a thorough and proper claims investigation. Further, Liberty's position in this matter is based on the claim facts and circumstances, and it is in compliance with the Utah Laws and rules of Worker's Compensation". "s\Tom Permenter", Claims Manager, Commercial Market Salt Lake City [Emphasis added]

"C/C: Vernon Sutphin, Western Region Claims Manager Corp. Public Affairs/ Presidential Service Team Attorney Michael Dyer"

Respondents thereafter took no action except to repeat the misconduct alleged at paragraphs 2-5 in their subsequent Motion to Dismiss of 7 March 1997. And the contents of this 7 March Motion to Dismiss formed the basis for Petitioner's subsequent Motions for Sanctions of 8 April 1997 which the Administrative Law Judge denied without finding of fact on 14 July 1997